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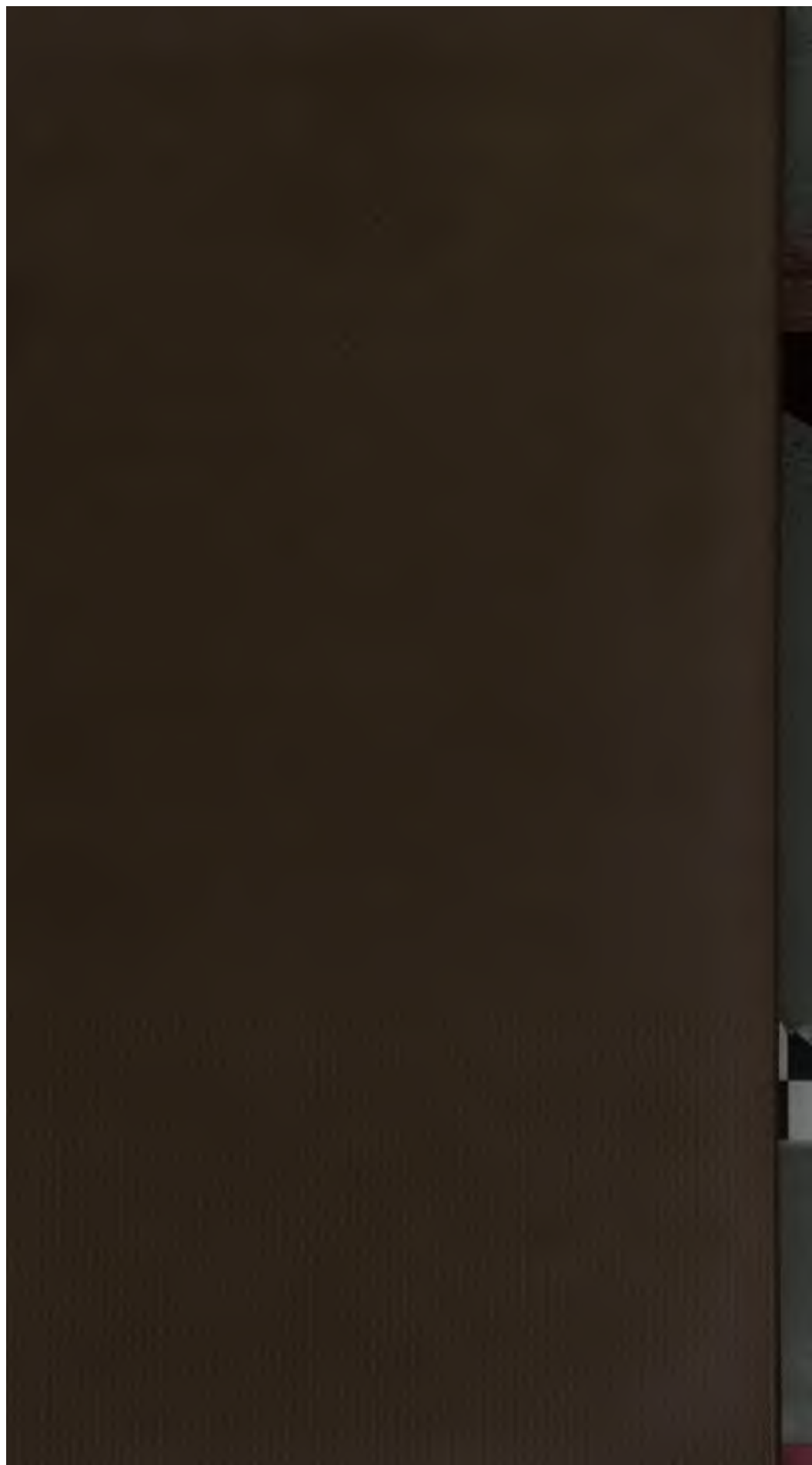
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L A W S
OF THE
STATE OF MAINE,
VOLUMES 1 AND 2;
WITH THE
CONSTITUTION OF THE U. STATES
AND OF SAID STATE,
PREFIXED.

ALSO,
NOTES AND REFERENCES,
Delineating the additions and modifications thereof,
WHICH HAVE BEEN ENACTED BY THE LEGISLATURE OF THE STATE,
FROM
1821 to 1834.

TO WHICH ARE APPENDED,
IN NOTES AND COMMENTS,
A F U L L S Y N O P S I S
Of the Decisions relating thereto, contained in the 17 volumes of Massachusetts Re-
ports; 10 volumes Pickering's Reports, and 7 volumes of Greenleaf's Reports.

BY FRANCIS O. J. SMITH,
COUNSELLOR AT LAW.

Vol. I.

PORTLAND:
THOMAS TODD AND COLMAN, HOLDEN & CO.
1834.

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The present edition of the first two volumes of the Laws of Maine is designed for the use of all classes of citizens, and not for those exclusively who are engaged in the practice of Law. And it is confidently believed, that in all ordinary cases of inquiry into the provisions and meaning of the Statute Laws which it contains, it will be found upon experiment to serve as a useful substitute for the thirty-four volumes of Law Reports, from which its notes have been carefully extracted.

An examination into the plan of the work will exhibit—

1st. Marginal references to the original statutes of Massachusetts from which each chapter of the aforesaid Laws of this State were copied, or compiled:

2dly. Abstracts of all the material decisions and constructions made by both the Supreme Judicial Court of Massachusetts, and the corresponding Court of this State, relating to said Statutes, or to Practice under them, as embraced in *seventeen* volumes of Massachusetts Reports, *ten* volumes of Pickering's Reports, and *seven* volumes of Greenleaf's Reports, and covering a period of more than twenty-seven years of judicial history:

3dly. Notes and references to all additions, and alterations which have been made to them by the Legislature of this State, since 1821 and up to the present time.

This plan has elicited the commendations of several of the most eminent jurists in the State, to whose consideration it was submitted. And although I am sensible that there may be imperfections in the execution of it, I feel conscious of having spared no pains of which my other avocations would permit, to render it accurate, and alike useful to members of the Bar, to Legislators, public officers and every private citizen who may have occasion to consult the Statute laws of this State.

I have been often asked, why I have not embraced in this edition the *third* volume of the Laws. And it may be well, perhaps, that my reasons for omitting to do so be stated here.

1st. The statutes comprised in the third volume have been recently compiled under the direction of the State, upon a plan conforming to that of the present volumes nearly to the full extent that was practicable.

2dly. Those statutes are in their character unlike those comprised in the present volumes, in that they are mostly of recent and adventitious origin, and comparatively of untried operation: and, therefore, of uncertain utility and duration.

3dly. Very few of them have been made the basis of any judicial decision or construction; and such of them as have been so, are not of sufficient general interest and magnitude to warrant the increased expense of a republication, at this time, of the whole volume, for the mere advantage of connecting therewith abstracts of such few adjudications upon them.

4thly. The original paging of the former edition of the first two volumes being referred to in the edition of the third volume mentioned, and also retained in these volumes; and the paging of the third volume being likewise made one class of the references contained

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herein, the connection of the series is made as complete and entire as it could have been made, had the third volume been wholly republished.

The whole of these volumes have been carefully compared with the original manuscript laws in the office of the Secretary of State. And not only the variations of the present edition from the originals have been noted, but the "errors in the originals" are also pointed out in detail, as will be seen by reference to the certificates of the Secretary of State, at the end of the respective volumes. The careful comparison which has thus been instituted renders this copy of the Statutes far more perfect than has ever before been published in the State.

With these explanations, I spread the work before the public, in the hope that it may prove of some service in rendering the laws and jurisprudence of the State more easy of comprehension, and of more practical convenience, than they otherwise might be, to all who are or may be interested therein;—and not doubting that the seal of public approbation upon it will be justly graduated to its actual merits.

FRANCIS Q. J. SMITH.

PORTLAND, January, 1834.

CONSTITUTION
OF THE
UNITED STATES.

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

Preamble.

ARTICLE I.

Section I.

1. ALL legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Legislative powers vested in Congress.

Section II.

1. The House of Representatives shall be composed of members chosen every second year by the people of the several States, and the Electors in each State shall have the qualifications requisite for Electors of the most numerous branch of the State Legislature.

House of Representatives; its members; by whom chosen; qualifications of Electors.

2. No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

A Representative to be aged 25 years; seven years a citizen of the United States, and an inhabitant of his state, when elected.

3. Representatives and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three fifths of all other per-

Representatives and direct taxes to be apportioned according to numbers.

- Actual enumeration every ten years.** sons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative; and, until such enumeration shall be made, the State of *New Hampshire* shall be entitled to choose three; *Massachusetts* eight; *Rhode-Island* and *Providence plantations* one; *Connecticut* five; *New-York* six; *New-Jersey* four; *Pennsylvania* eight; *Delaware* one; *Maryland* six; *Virginia* ten; *North Carolina* five; *South Carolina* five; and *Georgia* three.
- Limitation of the ratio of Representatives, &c.**
- First apportionment of Representatives.**
- Writs of election for filling vacancies.** 4. When vacancies happen in the representation from any State, the Executive Authority thereof shall issue writs of election to fill such vacancies.
- House of Representatives to choose their Speaker, &c.** 5. The House of Representatives shall choose their Speaker and other officers; and shall have the sole power of impeachment.

Section III.

- Two Senators chosen by the Legislature of each State for 6 years; each a vote. [*See Art. 5, clause 1.]**
- The Senate divided into three classes.**
- One third of the Senatorial seats vacated and filled every two years.**
- Executives of States to fill vacancies in the recess of Legislatures, &c.**
- Senator to be aged 30 years; nine years a citizen of the United States, and an inhabitant of his State, when chosen.**
1. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.*
2. Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one third may be chosen every second year; and if vacancies happen by resignation or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.
3. No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.
4. The Vice-President of the United States shall be Pres-

ident of the Senate, but shall have no vote, unless they be equally divided.

Vice President to be President of the Senate, to vote on an equal division only. The Senate to choose their President pro tempore, &c.

5. The Senate shall choose their other officers, and also a President pro-tempore, in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

6. The Senate shall have the sole power to try all impeachments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside : and no person shall be convicted without the concurrence of two thirds of the members present.

The sole power to try impeachments in the Senate, &c.

7. Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit under the United States ; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

Extent of judgment in cases of impeachment. Party liable also to judgment, &c. according to law.

Section IV.

1. The times, places, and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof ; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

Times, &c. of holding elections for Senators and Representatives regulated by the States or by Congress. Congress to assemble annually on the first Monday in December, &c.

2. The Congress shall assemble at least once in every year ; and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section V.

1. Each House shall be the judge of the elections, returns, and qualifications of its own members ; and a majority of each shall constitute a quorum to do business ; but a smaller number may adjourn from day to day, and may be authorised to compel the attendance of absent members, in such manner and under such penalties as each House may provide.

Each House to judge of the election of its own members. Quorum.

2. Each House may determine the rules of its proceedings ; punish its members for disorderly behaviour ; and, with the concurrence of two thirds, expel a member.

Each House to determine its own rules, &c.

Journals to be kept by each House and published, &c. 3. Each House shall keep a journal of its proceedings ; and, from time to time, publish the same, excepting such parts as may in their judgment, require secrecy : and the yeas and nays of the members of either House, on any question, shall, at the desire of one fifth of those present, be entered on the journal.

Adjournment of both Houses. 4. Neither House, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two Houses shall be sitting.

Section VI.

Senators and Representatives to be paid, &c. 1. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest, during their attendance at the session of their respective Houses, and in going to, or returning from the same ; and for any speech or debate in either House, they shall not be questioned in any other place.

Privileged from arrest, &c. 2. No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office, under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time ; and no person holding any office under the United States, shall be a member of either House, during his continuance in office.

Concerning the holding of offices by Senators and Representatives.

Section VII.

Revenue bills to originate in the House of Representatives, &c. 1. All bills, for raising revenue, shall originate in the House of Representatives ; but the Senate may propose or concur with amendments, as on other bills.

Powers of the President and of Congress in the enacting of laws, and the forms of proceeding on bills in that respect. 2. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it become a law, be presented to the President of the United States. If he approve, he shall sign it : but if not he shall return it, with his objections, to that House in which it shall have originated, who shall enter the objections at large on their journal, and proceed to re-consider it. If, after such re-consideration, two thirds of that House shall agree to pass the bill, it shall

be sent, together with the objections, to the other House, by which it shall likewise be re-considered ; and if approved by two thirds of that House, it shall become a law. But, in all such cases, the votes of both Houses shall be determined by yeas and nays ; and the names of the persons voting for and against the bill, shall be entered on the journal of each house respectively. If any bill shall not be returned by the President, within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress, by their adjournment, prevent its return ; in which case it shall not be a law.

3. Every order, resolution, or vote, to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States ; and, before the same shall take effect, shall be approved by him ; or being disapproved by him, shall be re-passed by two thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Joint Resolutions, except for adjournment, to receive the same sanction as Bills.

Section VIII.

The Congress shall have power—

1. To lay and collect taxes, duties, imposts and excises ; to pay the debts, and provide for the common defence and general welfare of the United States ; but all duties, imposts and excises shall be uniform throughout the United States :

Congress have power to lay taxes, &c.

2. To borrow money on the credit of the United States :

To borrow money.
To regulate commerce.

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes :

4. To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States :

To establish rules of naturalization, &c.

5. To coin money ; regulate the value thereof, and of foreign coin ; and fix the standard of weights and measures :

To coin money, &c.
To provide for punishing counterfeiters.

6. To provide for the punishment of counterfeiting the securities and current coin of the United States :

7. To establish post offices and post roads :

To establish P. Office, &c.

8. To promote the progress of science and useful arts, by

To promote science, &c.

securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries :

To constitute inferior tribunals; to define and punish piracies, felonies, &c.

9. To constitute tribunals inferior to the supreme court :

To declare war, &c.

To define and punish piracies and felonies committed on the high seas and offences against the law of nations :

To raise armies, &c.

10. To declare war ; grant letters of marque and reprisal ; and make rules concerning captures on land and water :

To provide a Navy, &c.

11. To raise and support armies ; but no appropriation of money to that use shall be for a longer term than two years :

To make rules for governing army and navy.

12. To provide and maintain a navy :

To provide for calling forth the militia.

13. To make rules for the government and regulation of the land and naval forces :

To provide for organizing the militia, &c.

14. To provide for calling forth the militia, to execute the laws of the Union, suppress insurrections and repel invasions :

15. To provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States ; reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress :

To exercise exclusive jurisdiction over a territorial district not exceeding ten miles square.

16. To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States ; and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings : and

To make all laws necessary to the execution of their powers.

17. To make all laws, which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Section IX.

Importation of certain persons not to be prohibited until after 1808. [*See Art. 5, clause 1.]

1. The migration or importation of such persons, as any of the States now existing, shall think proper to admit, shall not be prohibited by the Congress, prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.*

2. The privilege of the writ of habeas corpus shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it. Writ of habeas corpus recognized, &c.
3. No bill of attainder, or ex post facto law, shall be passed. No bills of attainder, or ex post facto laws.
4. No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken. Direct taxes according to census.
5. No tax or duty shall be laid on articles exported from any State. No preference shall be given by any regulation of commerce or revenue, to the ports of one State over those of another : nor shall vessels, bound to or from one State be obliged to enter, clear, or pay duties in another. No export duty, nor preference of one State to another in commerce.
6. No money shall be drawn from the Treasury, but in consequence of appropriations made by law : and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time. Money to be expended by legal appropriation only.
7. No title of nobility shall be granted by the United States. And no person, holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince or foreign State. No titles of nobility can be conferred by the U. States; nor can its officers accept presents, &c.

Section X.

1. No State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit ; make any thing but gold and silver coin a tender in payment of debts ; pass any bill of attainder ; ex post facto law, or law impairing the obligation of contract ; or grant any title of nobility. Powers withdrawn from States individually.
2. No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws ; and the net produce of all duties and imposts, laid by any State on imports or exports, shall be for the use of the Treasury of the United States ; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops, or ships of war, in time of peace, Powers which the States can exercise only under the sanction of Congress.

enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

ARTICLE II.

Section I.

Executive
power vested
in a President,
&c.

1. The Executive Power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows :

Electors of
President and
Vice President
&c.

2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives, to which the State may be entitled in the Congress ; but no Senator, or Representative, or person holding an office of trust or profit under the United States, shall be appointed an Elector.

Meeting of the
Electors of
President, &c.

3. *The Electors shall meet in their respective States, and vote by ballot for two persons, of whom one, at least, shall not be an inhabitant of the same State with themselves. And they*

Their proceed-
ings.

shall make a list of all the persons voted for, and of the number of votes for each ; which list they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate, and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of Electors appointed ; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President ; and if no person have a majority, then, from the five highest on the list, the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote : a quorum for this purpose shall consist of a member or members from two thirds of the States ; and a majority of all the States shall be necessary to a choice. In every case, after the choice of the Presi-

*dent, the person having the greatest number of votes of the Electors shall be the Vice-President. But if there shall remain two or more, who have equal votes, the Senate shall choose from them, by ballot, the Vice-President.**

[*Annulled. See amendments, Ar. 12.]

4. The Congress may determine the time of choosing the Electors and the day on which they shall give their votes ; which day shall be the same throughout the United States.

Congress may determine the time of choosing Electors of President, &c.

5. No person, except a natural born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President. Neither shall any person be eligible to that office, who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

The President to be natural born, or a citizen in 1788; aged 35 years; and 14 years a resident of the United States.

6. In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President ; and the Congress may, by law, provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President ; and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

In case of vacancy in the office of President, the Vice President to act, &c.

7. The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished, during the period for which he shall have been elected ; and he shall not receive, within that period, any other emolument from the United States, or any of them.

Compensation of the President.

8. Before he enter on the execution of his office, he shall take the following oath or affirmation :

The President to take an oath.

9. "I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States ; and will to the best of my ability, preserve, protect, and defend the Constitution of the United States."

Form of the oath.

Section II.

1. The President shall be commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States. He may require the opinion, in writing, of the prin-

The President is Commander in chief, &c.

He may re-

quire written opinions from principal executive officers. He can relieve and pardon.

principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices ; and he shall have power to grant reprieves and pardons, for offences against the United States, except in cases of impeachment.

He may, in conjunction with the Senate, make treaties, appoint Ambassadors, &c.

2. He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur : and he shall nominate, and by and with the advice and consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers, as they shall think proper, in the President alone, in the courts of law, or in the heads of departments.

Congress may vest certain appointments in the President alone, or otherwise.

The President may fill vacancies during the recess of the Senate.

3. The President shall have power to fill up all vacancies that may happen, during the recess of the Senate, by granting commissions, which shall expire at the end of their next session.

Section III.

President to inform Congress and recommend measures; may convene and adjourn Congress on certain occasions; receive Ambassadors, &c. shall see the laws executed; and commission all officers of the United States.

1. He shall, from time to time, give to the Congress information of the state of the Union ; and recommend to their consideration such measures as he shall judge necessary and expedient.

He may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive Ambassadors and other public ministers. He shall take care that the laws be faithfully executed ; and shall commission all the officers of the United States.

Section IV.

President, &c. removable on impeachment and conviction.

1. The President, Vice-President and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

Section I.

1. The Judicial power of the United States shall be vested in one Supreme Court, and in such Inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and Inferior Courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Judicial power vested in a Supreme Court, &c.

Judges to hold their offices during good behavior, &c.

Section II.

1. The Judicial Power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting Ambassadors, other public Ministers, and Consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State, claiming lands under grants of different States, and between a State, or citizens thereof, and foreign States, citizens or subjects.*

Extent of the Judicial power.

[*See a restriction of this provision. Amendments Article 11.]

2. In all cases, affecting Ambassadors, other public Ministers, and Consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

Original and appellate jurisdiction of the Supreme Court.

3. The trial of all crimes, except in cases of impeachment, shall be by jury: and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places, as the Congress may by law have directed.

Trial of crimes to be by jury, &c.

Section III.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted

Definition of treason.

Two witnesses
necessary to
conviction.

Congress to
declare the
punishment of
treason.

of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason ; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

ARTICLE IV.

Section I.

Credit to be
given in one
State to the
public acts,
&c. of another.

1. Full faith and credit shall be given, in each State, to the public acts, records, and judicial proceedings of every other State. *a*And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

Section II.

Reciprocity of
citizenship
throughout the
States.

Criminals flee-
ing from one
State to another,
to be de-
livered up on
demand.

1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

2. A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the Executive Authority of the State from which he fled, be delivered up, to be removed to the State, having jurisdiction of the crime.

Runaway
slaves, &c. to
be delivered
up.

3. No person, held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor ; but shall be delivered up on claim of the party to whom such service or labor may be due.

Section III.

New States
may be admit-
ted into the
Union, &c.

1. New States may be admitted by the Congress into this Union ; but no new State shall be formed or erected within the jurisdiction of any other State ; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

Congress to
have power
over territory,
&c.

2. The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States, and noth-

a See notes to Sec. 25, Ch. 50, of this Volume.

ing in this Constitution shall be so construed, as to prejudice any claims of the United States, or of any particular States.

Claims of the States &c. not to be prejudiced.

Section IV.

1. The United States shall guarantee to every State in this Union a republican form of Government ; and shall protect each of them against invasion, and on application of the Legislature, or of the Executive (when the Legislature cannot be convened,) against domestic violence.

Republican form of government guaranteed to each State, &c.

ARTICLE V.

1. The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two thirds of the several States, shall call a Convention for proposing amendments, which, in either case, shall be valid to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other mode of ratification may be proposed by the Congress : provided, that no amendment, which may be made prior to the year one thousand eight hundred and eight, shall in any manner affect the first* and fourth clauses in the ninth section of the first article ; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.†

Mode of amending this Constitution.

[*Concerning the importation of certain persons and direct taxes.]

[† See ante, Art. 1, Sec. 3, clause 1.]

ARTICLE VI.

1. All debts contracted, and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States, under this Constitution, as under the confederation.

Assumption of debts incurred under the confederation.

2. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land : and the Judges in every State shall be bound thereby, any thing in

This Constitution, Acts of Congress, and Treaties, to be the Supreme Law, &c. The State Judges bound thereby.

the Constitution or laws of any State to the contrary notwithstanding.

Senators, Representatives, &c. bound by oath or affirmation to support this Constitution. No religious test required.

3. The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all Executive and Judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

ARTICLE VII.

Ratification of nine States sufficient, &c.

The ratification of the Conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

AMENDMENTS TO THE CONSTITUTION.

ARTICLE I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ; or abridging the freedom of speech, or of the press ; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Congress prohibited from interfering with religion, with freedom of speech, of the press, and the right of petition.

ARTICLE II.

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

Right of the people to keep and bear arms, &c.

ARTICLE III.

No soldier shall, in time of peace, be quartered in any house without the consent of the owner ; nor in time of war, but in a manner to be prescribed by law.

No soldier to be quartered in any house, during peace, without consent, &c.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

No search warrant to issue, except on probable cause, oath, &c.

ARTICLE V.

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger ; nor shall any person be subject, for the same offence, to be twice put in jeopardy of life or limb ; nor shall be compelled, in any criminal case, to be a witness against himself, nor to be deprived of life, liberty or property, without due process of law ; nor shall private property be taken for public use without just compensation.

No person to be held to answer for a crime, unless on presentment, &c. except in the land or naval forces, nor to answer for the same offence twice, &c.

ARTICLE VI.

Assurance of speedy and public trial by jury, &c. in criminal prosecutions.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.

ARTICLE VII.

Right of trial by jury in suits at common law, above the value of 20 dollars, &c.

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury, shall be preserved, and no fact tried by a jury, shall be otherwise re-examined, in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail, and unjust and cruel punishments prohibited.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

Rights enumerated, not to disparage those retained.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

Powers not delegated, &c. are reserved to the States or people.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

Restriction of Judicial powers, [See ante, Art. 3, Sec. 2, clause 1.]

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

[* See ante, Art. 2, Sec. 1, clause 3.]
Mode of electing the President and Vice President of the United States.

ARTICLE XII.*

1. The electors shall meet in their respective States, and vote, by ballot, for President and Vice President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name, in their ballots, the per-

son voted for as President, and, in distinct ballots, the person voted for as Vice President ; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice President, and the number of votes for each ; which lists they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate ; the President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted : the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed ; and if no person have such majority, then, from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose, immediately, by ballot, the President. But, in choosing the President, the votes shall be taken by States, the representation from each State having one vote ; a quorum for this purpose shall consist of a member or members, from two thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice President shall act as President, as in the case of the death, or other constitutional disability of the President.

2. The person having the greatest number of votes as Vice President, shall be the Vice President, if such number be a majority of the whole number of electors appointed ; and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice President : a quorum for the purpose shall consist of two thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice.

Election of
Vice President.

3. But no person constitutionally ineligible to the office of President, shall be eligible to the office of Vice President of the United States.

CONSTITUTION OF MAINE.

Preamble. WE, the people of Maine, in order to establish justice, ensure tranquillity, provide for our mutual defence, promote our common welfare, and secure to ourselves and our posterity the blessings of liberty, acknowledging with grateful hearts the goodness of the Sovereign Ruler of the Universe in affording us an opportunity, so favorable to the design ; and, imploring his aid and direction in its accomplishment, do agree to form ourselves into a free and independent State, by the style and title of the State of Maine, and do ordain and establish the following Constitution for the government of the same.

ARTICLE I.

DECLARATION OF RIGHTS.

Natural rights. SEC. 1. All men are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.

All power inherent in the people. SEC. 2. All power is inherent in the people ; all free governments are founded in their authority and instituted for their benefit ; they have therefore an unalienable and infeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.

Freedom of worship. SEC. 3. All men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no one shall be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, nor for his religious professions or sentiments, provided he does not disturb the public peace, nor obstruct others in their religious worship ;—and all persons demeaning themselves peaceably, as good members of the State, shall be equally under the protection of the laws, and no subordination nor preference of any one sect or denomination to another shall ever be established by law, nor shall any religious test

[See Statute passed Feb. 21, 1833, relative to the religious opinions of witnesses.]

All religious sects equal.

Religious tests prohibited.

be required as a qualification for any office or trust, under this State; and all religious societies in this State, whether incorporate or unincorporate, shall at all times have the exclusive right of electing their public teachers, and contracting with them for their support and maintenance.

SEC. 4. Every citizen may freely speak, write and publish his sentiments on any subject, being responsible for the abuse of this liberty; no laws shall be passed regulating or restraining the freedom of the press; and in prosecutions for any publication respecting the official conduct of men in public capacity, or the qualifications of those who are candidates for the suffrages of the people, or where the matter published is proper for public information, the truth thereof may be given in evidence, and in all indictments for libels the jury, after having received the direction of the court, shall have a right to determine, at their discretion, the law and the fact.

Freedom of speech and publication.

Truth may be given in evidence.
[See Statute, passed March 2, 1883, respecting prosecutions for libels.]

SEC. 5. The people shall be secure in their persons, houses, papers and possessions from all unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, shall issue without a special designation of the place to be searched, and the person or thing to be seized, nor without probable cause—supported by oath or affirmation.

Unreasonable searches.

[*See Sanford v. Nichols & al. 13 Mass. 238.]

SEC. 6. In all criminal prosecutions, the accused shall have a right to be heard by himself and his counsel, or either, at his election (a);

Rights of persons accused.

To demand the nature and cause of the accusation, and have a copy thereof;

To be confronted by the witnesses against him;

To have compulsory process for obtaining witnesses in his favor;

To have a speedy, public and impartial trial, and, except in trials by martial law or impeachment, by a jury of the vicinity.† He shall not be compelled to furnish or give evidence against himself,‡ nor be deprived of his life, liberty,

[†See note to § 40, ch. 59, Vol. 1.]
[‡Sec 5 Pick. 448; 8 Pick. 211.]

(a) By necessary construction of Sec. 6, an appeal lies in all criminal prosecutions from the sentence of a Justice of the Peace, who tries without a jury, to the C. C. Pleas, where a trial by jury may be had. *Johnson's case*, 1 Glf. 230.

property or privileges, but by judgment of his peers or the law of the land.

No person to answer to a capital crime, &c. but on indictment.

Exceptions.

Juries.

[*See ch. 84, Vol. 1.]

Not to be put in jeopardy twice for one crime.

Sanguinary laws, &c. prohibited.

All persons allowed bail.

Bills of attainder, &c. prohibited.

Treason defined.

SEC. 7. No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury, except in cases of impeachment, or in such cases of offences, as are usually cognizable by a justice of the peace, or in cases arising in the army or navy, or in the militia when in actual service in time of war or public danger. The legislature shall provide by law a suitable and impartial mode of selecting juries,* and their usual number and unanimity (b), in indictments and convictions, shall be held indispensable.

SEC. 8. No person, for the same offence, shall be twice put in jeopardy of life or limb.

SEC. 9. Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offence: excessive bail (c) shall not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted.

SEC. 10. All persons, before conviction, shall be bailable, except for capital offences, where the proof is evident or the presumption great. And the privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

SEC. 11. The legislature shall pass no bill of attainder, *ex post facto* law, nor law impairing the obligation of contracts, and no attainder shall work corruption of blood nor forfeiture of estate.

SEC. 12. Treason against this State shall consist only in levying war against it, adhering to its enemies, giving them aid and comfort. No person shall be convicted of treason,

(b) 1. Grand Jurors may be examined as witnesses in Court, to the question whether twelve of the panel actually concurred, or not, in the finding of a bill of indictment. *Low's Case, 4 Glf. 489.*

2. The want of the usual unanimity in the finding of a bill, may be shewn to the Court by motion in writing, in the nature of a plea in abatement, at the time the defendant is arraigned. *ib.*

(c) If excessive bail be required in an action for a tort, the S. Court will, upon *habeas corpus*, discharge the defendant, upon his giving bail in a reasonable sum. *Jones vs. Kelley 17, Mass. 116.*

unless on the testimony of two witnesses to the same overt act, or confession in open court.

[For punishment of, See Laws, ch. 1, Vol. 1.]
Suspension of laws.
[*5 Pick. 65.]

SEC. 13. The laws shall not be suspended but by the Legislature or its authority.*

SEC. 14. No person shall be subject to corporeal punishment under military law, except such as are employed in the army or navy, or in the militia when in actual service in time of war or public danger.

Corporeal punishment under military law.

SEC. 15. The people have a right at all times in an orderly and peaceable manner to assemble to consult upon the common good, to give instructions to their representatives, and to request, of either department of the government by petition or remonstrance, redress of their wrongs and grievances.

Right to petition.

SEC. 16. Every citizen has a right to keep and bear arms for the common defence ; and this right shall never be questioned.

To keep and bear arms.

SEC. 17. No standing army shall be kept up in time of peace without the consent of the Legislature, and the militia shall, in all cases, and at all times, be in strict subordination to the civil power.

Standing armies not to be kept ;

SEC. 18. No soldier shall, in time of peace be quartered in any house without the consent of the owner or occupant, nor in time of war, but in a manner to be prescribed by law.

Nor soldiers quartered on citizens, but in time of war.

SEC. 19. Every person, for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law ; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay.

Right of redress for injuries.

SEC. 20. In all civil suits, and in all controversies concerning property, the parties shall have a right to a trial by jury, except in cases where it has heretofore been otherwise practised (d) : the party claiming the right may be heard by himself and his counsel, or either, at his election.

Trial by jury.

SEC. 21. Private property shall not be taken for public

Private prop-

(d) See note to Sec. 15, ch. 122, of Volume 2; also Mass. Declaration of Rights, Sec. 15. Also 6 Pick. 376 ; and 7 Pick. 369.

erty not to be taken without compensation. uses without just compensation; nor unless the public exigencies require it (e).

Taxes.

SEC. 22. No tax or duty shall be imposed without the consent of the people or of their Representatives in the Legislature.

Titles of nobility prohibited.

SEC. 23. No title of nobility or hereditary distinction, privilege, honor or emolument, shall ever be granted or confirmed, nor shall any office be created, the appointment to which shall be for a longer time than during good behavior.

Other rights not to be impaired.

SEC. 24. The enumeration of certain rights shall not impair nor deny others retained by the people.

ARTICLE II.

ELECTORS.

Qualification of Electors.

SEC. 1. Every male citizen of the United States of the age of twenty-one years and upwards, excepting paupers (f), persons under guardianship, and Indians not taxed, having his residence established in this State for the term of three months next preceding any election, shall be an elector for Governor, Senators and Representatives, in the town or plantation where his residence is so established (g); and the elec-

(e) 1. The Legislature has the power to judge when the public exigency requires that private property be taken for public uses. *Spring vs. Russell, et als.* 7 *Gl.* 278.

2. In case of laying out a highway, if the owner of the land taken therefor, is benefitted more than injured thereby, a jury may return their verdict that the owner has sustained no damages. *Com. vs. Coombs*, 2 *Mass.* 489. *Com. vs. Justices of Sessions*, 9 *Mass.* 388.

(f) Persons who have received assistance from any town as paupers, or been disposed of in service as such by the overseers of the poor, may still vote for state officers, if otherwise qualified, provided they have not been paupers within three months next preceding the day of election. 7 *Gl.* App. 497.

(g) 1. To qualify a citizen to be an elector of State officers, he must have resided the three preceding months not only in the State, but in the town or plantation where he claims to vote. 7 *Gl.* App. 492

2. A person who supports his family in one town, and resides to transact business in another town, can vote for State officers only in the town where his family have resided for the three months next preceding the election. *ib.* 497.

tions shall be by written (h) ballot. But persons in the military, naval or marine service of the United States, or this State, shall not be considered as having obtained such established residence by being stationed in any garrison, barrack, or military place, in any town or plantation, nor shall the residence of a student at any seminary of learning entitle him to the right of suffrage in the town or plantation where such seminary is established.

Soldiers and seamen in the United States service excepted.

Students at Colleges or Academies.

SEC. 2. Electors shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest on the days of election, during their attendance at, going to, and returning therefrom.

Electors exempt from arrest on days of election,

SEC. 3. No elector shall be obliged to do duty in the militia on any day of election, except in time of war or public danger.

And from military duty.

SEC. 4. The election of Governor, Senators and Representatives, shall be on the second Monday of September annually forever.

Time of elections.

ARTICLE III.

DISTRIBUTION OF POWERS.

SEC. 1. The powers of this Government shall be divided into three distinct departments, the *Legislative*, (i) *Executive* and *Judicial*.

Powers distributed.

SEC. 2. No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted (j).

And to be kept separate.

(h) Printed ballots are within the meaning of this clause. 7 *Glif. App.* 492.

(i) The Legislature have no authority to pass any act or resolve granting an appeal, or a new trial in any cause between private citizens, or dispensing with any general law in favor of a particular case. *Lewis vs. Webb*, 3 *Glif.* 326.

(j) 1. According to this provision, a person cannot hold at the same time the several offices of Sheriff, or deputy Sheriff, and Justice of the Peace, nor the offices of Coroner and Justice of the Peace. 3 *Glif. App.* 486. *Bamford vs. Melvin*, 7 *Glif.* 17.

2. The oath of the latter office must be taken and subscribed, or the former office will not be affected. *Chapman & al. vs. Shaw*, 3 *Glif.* 372.

ARTICLE IV.—*Part First.*

LEGISLATIVE POWER—HOUSE OF REPRESENTATIVES.

Legislative power.

SEC. 1. The Legislative power shall be vested in two distinct branches, a House of Representatives, and a Senate, each to have a negative on the other, and both to be styled the *Legislature of Maine*, and the style of their Acts and Laws, shall be, "*Be it enacted by the Senate and House of Representatives in Legislature assembled.*"

Style.

House of Representatives elected annually, to consist of not less than 100 nor more than 200.

SEC. 2. The House of Representatives shall consist of not less than one hundred nor more than two hundred members, to be elected by the qualified Electors for one year from the day next preceding the annual meeting of the Legislature. The Legislature which shall first be convened under this Constitution, shall, on or before the fifteenth day of August in the year of our Lord one thousand eight hundred and twenty one, and the Legislature, within every subsequent period of at most ten years and at least five, cause the number of the inhabitants of the State to be ascertained, exclusive of foreigners not naturalized, and Indians not taxed. The number of Representatives shall, at the several periods of making such enumeration, be fixed and apportioned among the several counties, as near as may be, according to the number of inhabitants, having regard to the relative increase of population. (k) The number of Representatives shall, on said first apportionment, be not less than one hundred nor more than one hundred and fifty; and, whenever the number of Representatives shall be two hundred, at the next annual meetings of elections, which shall thereafter be had; and at every subsequent period of ten years, the people shall give in their votes, whether the number of Representatives shall be increased or diminished, and if a majority of votes are in favor thereof, it shall be the duty of the next Legislature thereafter to increase or diminish the number by the rule hereinafter prescribed.

To be apportioned once in ten years.

Equally among the counties.

(k) See a Judicial exposition of this provision, 3 *Glf. App.* 477.

SEC. 3. Each town having fifteen hundred inhabitants may elect one representative ; each (1) town having three thousand seven hundred and fifty may elect two : each town having six thousand seven hundred and fifty may elect three ; each town having ten thousand five hundred may elect four ; each town having fifteen thousand may elect five ; each town having twenty thousand two hundred and fifty may elect six ; each town having twenty six thousand two hundred and fifty inhabitants may elect seven ; but no town shall ever be entitled to more than seven representatives : and towns and plantations duly organized, not having fifteen hundred inhabitants, shall be classed, as conveniently as may be, into districts containing that number, and so as not to divide towns ; and each such district may elect one representative ; and when on this apportionment the number of representatives shall be two hundred, a different apportionment shall take place upon the above principle ; and, in case the fifteen hundred shall be too large or too small to apportion all the representatives to any county, it shall be so increased or diminished as to give the number of representatives according to the above rule and proportion ; and whenever any town or towns, plantation or plantations not entitled to elect a representative shall determine against a classification with any other town or plantation, the Legislature may, at each apportionment of representatives, on the application of such town or plantation, authorise it to elect a representative for such portion of time and such periods, as shall be equal to its portion of representation : and the right of representation, so established, shall not be altered until the next general apportionment.

Apportionment of representatives among towns.

SEC. 4. No person shall be a member of the House of Representatives, unless he shall, at the commencement of the period for which he is elected, have been five years a citizen of the United States, have arrived at the age of twenty one years, have been a resident in this State one year, or from

Qualifications of a representative.

(1) Whether a town, having the right to send a representative, has the power to waive that right by a vote not to send one, so as to bind the minority. *Quere*—6 *Glf. App.* 486 & 494.

the adoption of this Constitution ; and, for the three months next preceding the time of his election shall have been, and, during the period for which he is elected, shall continue to be a resident in the town or district which he represents.

Meetings for
choice of rep-
resentatives
regulated.

Towns class-
ed.

SEC. 5. The meetings for the choice of representatives shall be warned in due course of law by the selectmen of the several towns seven days at least before the election, and the selectmen thereof shall preside impartially at such meetings, receive the votes of all the qualified electors present, sort, count and declare them in open town meeting, and in the presence of the town clerk, who shall form a list of the persons voted for, with the number of votes for each(m) person against his name, shall make a fair record thereof in the presence of the selectmen, and in open town meeting ; and a fair copy of this list shall be attested by the selectmen and town clerk, and delivered by said selectmen to each representative within ten days next after such election. And the towns and plantations organized by law, belonging to any class herein provided, shall hold their meetings at the same time in the respective towns and plantations ; and the town and plantation meetings in such towns and plantations shall be notified, held and regulated, the votes received, sorted, counted and declared in the same manner. And the Assessors and clerks of plantations shall have all the powers, and be subject to all the duties, which selectmen and town clerks have, and are subject to by this Constitution. And the selectmen of such towns, and the assessors of such plantations, so classed, shall, within four days next after such meeting, meet at some place, to be prescribed and notified by the selectmen or assessors of the eldest town, or plantation, in such class, and the copies of said lists shall be then examined and compared ; and in case any person shall be elected by a majority of all the votes, the selectmen or assessors shall deliver the certified copies of such lists to the person so elected, within ten days next after such election ; and the clerks of towns and

(m) Ballots for persons who do not possess the constitutional qualifications of a representative cannot be counted as votes, under Section 5, so as to prevent a majority of the votes, given for eligible candidates, from constituting a choice. 7 *Gl. App.* 497.

plantations respectively shall seal up copies of all such lists and cause them to be delivered into the Secretary's office twenty days at least before the first Wednesday in January annually ; but in case no person shall have a majority of votes, the selectmen and assessors shall, as soon as may be, notify another meeting, and the same proceedings shall be had at every future meeting, until an election shall have been effected : *Provided*, That the Legislature may by law prescribe a different mode of returning, examining and ascertaining the election of the representatives in such classes.

[See ch. 518, § 9, Vol. 3, p. 375. Also statute, Feb'y. 3, 1832, ch. 2.]

SEC. 6. Whenever the seat of a member shall be vacated by death, resignation, or otherwise, the vacancy may be filled by a new election.

Vacancies to be filled by new elections.

SEC. 7. The House of Representatives shall choose their Speaker, Clerk and other officers.

House to choose Speaker, &c.

SEC. 8. The House of Representatives shall have the sole power of impeachment.

To have the power of impeachment.

ARTICLE IV.—*Part Second.*

SENATE.

SEC. 1. The Senate shall consist of not less than twenty, (n) nor more than thirty one members, elected at the same time, and for the same term, as the representatives, by the qualified electors of the districts, into which the State shall from time to time be divided.

Senate to consist of not less than 20 nor more than 31

SEC. 2. The Legislature, which shall be first convened under this Constitution, shall, on or before the fifteenth day of August, in the year of our Lord one thousand eight hundred and twenty one, and the Legislature at every subsequent period of ten years, cause the State to be divided into districts for the choice of Senators. The districts shall conform, as near as may be, to county lines, and be apportioned according to the number of inhabitants. The number of Senators shall not exceed twenty at the first apportionment,

State to be districted once in ten years at least.

(n) A less number than twenty Senators, if it be a majority of that number, may organize the Senate, and transact any business in the filling of vacancies, &c. which is authorized by the Constitution. 7 *Glif. App.* 489.

and shall at each apportionment be increased, until they shall amount to thirty one, according to the increase in the House of Representatives.

Meetings for
choice of Sen-
ators regula-
ted.

SEC. 3. The meetings for the election of Senators shall be notified, held and regulated, and the (o) votes received, sorted, counted, declared and recorded, in the same manner as those for Representatives. And fair copies of the lists of votes shall be attested by the selectmen and town clerks of towns, and the assessors and clerks of plantations, and sealed up in open town and plantation meetings; and the town and plantation clerks respectively shall cause the same to be delivered into the Secretary's office thirty days at least before the first Wednesday of January. All other qualified electors living in places unincorporated, who shall be assessed to the support of government by the assessors of an adjacent town, shall have the privilege of voting for Senators, Representatives and Governor in such town; and shall be notified by the selectmen thereof for that purpose accordingly.

[For penalty
in case of ne-
glect to return
votes by Clerk,
or other per-
son entrusted
with them, see
ch. 518, § 6 &
7, Vol. 3, p.
374.]

Votes to be ex-
amined by the
Governor and
Council.

SEC. 4. The Governor and Council shall, as soon as may be, examine the returned copies of such lists, and, twenty days before the said first Wednesday of January, issue a summons to such persons, as shall appear to be elected by a majority of the votes in each district, to attend that day and take their seats.

Senate to de-
termine on e-
lections.

SEC. 5. The Senate shall, on the said first Wednesday of January, annually, determine who are elected by a majority of votes to be Senators in each district; and in case the full number of Senators to be elected from each district shall not have been so elected, the members of the House of Representatives, and such Senators as shall have been elected, shall, from the highest numbers of the persons voted for, on said lists, equal to twice the number of Senators deficient, in every district, if there be so many voted for, elect by joint ballot the number of Senators required; and in this manner

Vacancies
how supplied.

(o) A ballot containing a less number of names for Senators, than is assigned to the Senatorial district in which it is given, is still a constitutional ballot. 7 *Glif. App.* 497. See *Laws*, ch. 518, § 3, Vol. 3, p. 372.

all vacancies in the Senate shall be supplied, as soon as may be, after such vacancies happen (*p*).

SEC. 6. The Senators shall be twenty-five years of age at the commencement of the term, for which they are elected, and in all other respects their qualifications shall be the same as those of the Representatives. Qualification of Senators.

SEC. 7. The Senate shall have the sole power to try all impeachments, and when sitting for that purpose shall be on oath or affirmation, and no person shall be convicted without the concurrence of two thirds of the members present. Their Judgment, however, shall not extend farther than to removal from office, and disqualification to hold or enjoy any office of honor, trust or profit under this State. But the party, whether convicted or acquitted, shall nevertheless be liable to indictment, trial, judgment and punishment according to law. Senate to try impeachments.

Party liable to be tried and punished after.

SEC. 8. The Senate shall choose their President, Secretary and other officers. To choose a president, &c.

ARTICLE IV.—*Part Third.*

LEGISLATIVE POWER.

SEC. 1. The Legislature shall convene on the first Wednesday of January annually, and shall have full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States. Legislature to meet annually.

SEC. 2. Every bill or resolution, having the force of law, to which the concurrence of both Houses may be necessary, Governor to sign their acts.

(*p*) 1. When a quorum of the Senate is constitutionally elected, a convention of the Senate and House of Representatives cannot legally be formed for the purpose of supplying deficiencies in the Senate, without the concurrence of both these branches of the Legislature. 6 *Glif. App.* 514. 7 *Glif. App.* 490.

2. It belongs to the Senate alone to ascertain who are the constitutional candidates to supply deficiencies at that board. *ib.*

3. If a Senator is not constitutionally elected, his being afterwards suffered to sit and vote as a Senator does not cure the defect, or give any validity to his election. 7 *Glif. App.* 490

If he disapprove—proceedings in such case.

To return the bill in five days.

[See Cons. of Mass. ch. 1, § 1, art. 2; and 3 Mass. 567.]

Each house to judge of elections, &c.; majority a quorum.

May punish and expel members, &c.

To keep a journal.

Yeas & nays.

May punish for contempt.

except on a question of adjournment, which shall have passed both Houses, shall be presented to the Governor, and if he approve, he shall sign it; if not, he shall return it with his objections to the House, in which it shall have originated, which shall enter the objections at large on its journals, and proceed to reconsider it. If, after such reconsideration two thirds of that House shall agree to pass it, it shall be sent, together with the objections to the other House, by which it shall be reconsidered, and, if approved by two thirds of that House, it shall have the same effect, as if it had been signed by the Governor: but in all such cases, the votes of both Houses shall be taken by yeas and nays, and the names of the persons, voting for and against the bill or resolution, shall be entered on the journals of both Houses respectively. If the bill or resolution shall not be returned by the Governor within five days (Sundays excepted) after it shall have been presented to him, it shall have the same force and effect, as if he had signed it, unless the Legislature by their adjournment prevent its return, in which case it shall have such force and effect, unless returned within three days after their next meeting.

SEC. 3. Each House shall be the judge of the elections and qualifications of its own members, and a majority shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may compel the attendance of absent members, in such manner and under such penalties as each House shall provide.

SEC. 4. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member, but not a second time for the same cause.

SEC. 5. Each House shall keep a journal, and from time to time publish its proceedings, except such parts as in their judgment may require secrecy: and the yeas and nays of the members of either House on any question, shall, at the desire of one fifth of those present, be entered on the journals.

SEC. 6. Each House, during its session, may punish by imprisonment any person, not a member, for disrespectful or disorderly behavior in its presence, for obstructing any of its

proceedings, threatening, assaulting or abusing any of its members for any thing said, done, or doing in either House : *Provided*, that no imprisonment shall extend beyond the period of the same session.

SEC. 7. The Senators and Representatives shall receive such compensation (*q*), as shall be established by law : but no law increasing their compensation shall take effect during the existence of the Legislature, which enacted it. The expenses of the members of the House of Representatives in travelling to the Legislature, and returning therefrom, once in each session and no more, shall be paid by the State out of the public Treasury to every member, who shall seasonably attend, in the judgment of the House, and does not depart therefrom without leave.

SEC. 8. The Senators and Representatives shall, in all cases except treason, felony or breach of the peace, be privileged from arrest during their attendance at, going to, and returning from each session of the Legislature, and no member shall be liable to answer for any thing spoken in debate in either House, in any court or place elsewhere.

SEC. 9. Bills, orders or resolutions, may originate in either House, and may be altered, amended or rejected in the other ; but all bills for raising a revenue shall originate in the House of Representatives, but the Senate may propose amendments as in other cases : *Provided*, that they shall not, under color of amendment, introduce any new matter, which does not relate to raising a revenue.

SEC. 10. No Senator or Representative shall, during the term for which he shall have been elected, be appointed to any civil office (*r*) of profit under this State, which shall have been created, or the emoluments of which increased during such term, except such offices as may be filled by elections

(*q*) See *Laws*, ch. 216, Vol. 3, p. 44.

(*r*) The term "office" implies a delegation of a portion of sovereign power to, and possession of it by the person filling the office. An employment under the government as an agent, to execute a Resolve of the Legislature relative to the public lands, is not within the meaning of this provision. 3 *Gl. App.* 481.

Proviso. by the people : *Provided*, that this prohibition shall not extend to the members of the first Legislature.

Persons disqualified to be members. SEC. 11. No member of Congress, nor person holding any office under the United States (post officers excepted) nor office of profit under this State, Justices of the Peace, Notaries Public, Coroners and officers of the militia excepted, shall have a seat in either House during his being such member of Congress, or his continuing in such office.

Adjournments. SEC. 12. Neither House shall during the session, without the consent of the other, adjourn for more than two days, nor to any other place than that in which the Houses shall be sitting.

ARTICLE V.—Part First.

EXECUTIVE POWER.

Governor. SEC. 1. The supreme executive power of this State shall be vested in a Governor.

Elected for one year. SEC. 2. The Governor shall be elected by the qualified Electors, and shall hold his office one year from the first Wednesday of January in each year.

Meetings for the choice of Governor regulated. SEC. 3. The meetings for election of Governor shall be notified, held and regulated, and votes shall be received, sorted, counted, declared and recorded, in the same manner as those for Senators and Representatives. They shall be sealed and returned into the Secretary's office in the same manner, and at the same time, as those for Senators. And the Secretary of State for the time being shall, on the first Wednesday of January, then next, lay the lists before the Senate and House of Representatives to be by them examined, and, in case of a choice by a majority of all the votes returned, they shall declare and publish the same. But, if no person shall have a majority of votes, the House of Representatives shall, by ballot, from the persons having the four highest number of votes on the lists, if so many there be, elect two persons, and make return of their names to the Senate, of whom the Senate shall, by ballot, elect one, who shall be declared the Governor.

Votes to be returned to Secretary of State's office.

If there be no choice, provision in such case.

SEC. 4. The Governor shall, at the commencement of

his term, be not less than thirty years of age ; a natural born citizen of the United States, have been five years, or from the adoption of this Constitution, a resident of the State ; and at the time of his election and during the term for which he is elected, be a resident of said State.

Qualifications
of Governor.

SEC. 5. No person holding any office or place under the United States, this State, or any other power, shall exercise the office of Governor.

Disqualifica-
tions.

SEC. 6. The Governor shall, at stated times, receive for his services a compensation, which shall not be increased or diminished during his continuance in office.

Compensa-
tion.

SEC. 7. He shall be commander in chief of the army and navy of the State, and of the Militia, except when called into the actual service of the United States ; but he shall not march nor convey any of the citizens out of the State without their consent, or that of the Legislature, unless it shall become necessary, in order to march or transport them from one part of the State to another for the defence thereof.

Commander in
chief of the
Militia.

Not to march
the Militia out
of the State.

SEC. 8. He shall nominate, and, with the advice and consent of the Council, appoint all judicial officers, the Attorney General, the Sheriffs, Coroners, Registers of Probate, and Notaries Public ; and he shall also nominate, and with the advice and consent of the Council, appoint all other civil and military officers, whose appointment is not by this Constitution, or shall not by law be otherwise provided for ; and every such nomination shall be made seven days, at least, prior to such appointment.

With the ad-
vice of Coun-
cil to appoint
officers.

SEC. 9. He shall from time to time give the Legislature information of the condition of the State, and recommend to their consideration such measures, as he may judge expedient.

To communi-
cate informa-
tion to the Le-
gislature.

SEC. 10. He may require information from any military officer, or any officer in the executive department, upon any subject relating to the duties of their respective offices.

May require
information of
any officer.

SEC. 11. He shall have power, with the advice and consent of the Council, to remit, after conviction, all forfeitures and penalties, and to grant reprieves and pardons, except in cases of impeachment.

To have the
power of par-
doning.

To see that the laws are executed.

SEC. 12. He shall take care that the laws be faithfully executed.

To convene the Legislature on extraordinary occasions and adjourn them in case of disagreement.

SEC. 13. He may, on extraordinary occasions, convene the Legislature; and in case of disagreement between the two Houses with respect to the time of adjournment, adjourn them to such time, as he shall think proper, not beyond the day of the next annual meeting; and if, since the last adjournment, the place where the Legislature were next to convene shall have become dangerous from an enemy or contagious sickness, may direct the session to be held at some other convenient place within the State.

Vacancy how supplied.

SEC. 14. Whenever the office of Governor shall become vacant by death, resignation, removal from office or otherwise, the President of the Senate shall exercise the office of Governor until another Governor shall be duly qualified(s); and in case of the death, resignation, removal from office or other disqualification of the President of the Senate, so exercising the office of Governor, the Speaker of the House of Representatives shall exercise the office, until a President of the Senate shall have been chosen; and when the office of Governor, President of the Senate, and Speaker of the House shall become vacant, in the recess of the Senate, the person, acting as Secretary of State for the time being, shall, by proclamation convene the Senate, that a President may be chosen to exercise the office of Governor. And whenever either the President of the Senate, or Speaker of the House shall so exercise said office, he shall receive only the compensation of Governor, but his duties as President or Speaker shall be suspended; and the Senate or House, shall fill the vacancy, until his duties as Governor shall cease.

(s) 1. The Executive duties of the State, when constitutionally exercised by the President of the Senate, devolve, at the end of the political year when so exercised, on the President of the Senate of the next political year, if the office of Governor continues vacant. 6 *Gl. App.* 506.

2. While the President of the Senate, in virtue of that office, is clothed with the power of the Chief Executive, the office of Governor being vacant, he cannot lawfully preside, or vote in the Senate. 7 *Gl. App.* 499.

ARTICLE V.—*Part Second.*

COUNCIL.

SEC. 1. There shall be a Council, to consist of seven persons, citizens of the United States, and residents of this State, to advise the Governor in the executive part of government, whom the Governor shall have full power, at his discretion, to assemble; and he, with the Counsellors, or a majority of them, may from time to time, hold and keep a Council, for ordering and directing the affairs of State according to law.

Council to consist of seven.

SEC. 2. The Counsellors shall be chosen annually, on the first Wednesday of January, by joint ballot of the Senators and Representatives in Convention; and vacancies, which shall afterwards happen, shall be filled in the same manner; but not more than one Counsellor shall be elected from any district, prescribed for the election of Senators; and they shall be privileged from arrest in the same manner, as Senators and Representatives.

Counsellors how chosen.

SEC. 3. The resolutions and advice of Council shall be recorded in a register, and signed by the members agreeing thereto, which may be called for by either House of the Legislature; and any Counsellor may enter his dissent to the resolution of the majority.

Journal of their proceedings.

SEC. 4. No member of Congress, or of the Legislature of this State, nor any person holding any office under the United States, (post officers excepted) nor any civil officers under this State, (Justices of the Peace and Notaries Public excepted) shall be Counsellors. And no Counsellor shall be appointed to any office during the time, for which he shall have been elected.

Persons disqualified to be Counsellors.

Not to be appointed to any office.

ARTICLE V.—*Part Third.*

SECRETARY.

SEC. 1. The Secretary of State shall be chosen annually, at the first session of the Legislature, by joint ballot of the Senators and Representatives in Convention.

Secretary how chosen. [In case of vacancy, See Laws, ch. 195, Vol. 3, p. 19.]

To keep records.
[Office at Seat of Govt. See Laws, ch. 212, Vol. 3, p. 42.]
To attend the Governor, Council, &c.

SEC. 2. The records of the State shall be kept in the office of the Secretary, who may appoint his deputies, for whose conduct he shall be accountable.

SEC. 3. He shall attend the Governor and Council, Senate and House of Representatives, in person or by his deputies, as they shall respectively require.

To preserve government records.
[Give bond; See Laws, ch. 481, Vol. 3, p. 829.]

SEC. 4. He shall carefully keep and preserve the records of all the official acts and proceedings of the Governor and Council, Senate and House of Representatives, and, when required, lay the same before either branch of the Legislature, and perform such other duties as are enjoined by this Constitution, or shall be required by law.

ARTICLE V.—*Part Fourth.*

TREASURER.

Treasurer how chosen; only eligible for five years in succession.

SEC. 1. The Treasurer shall be chosen annually, at the first session of the Legislature, by joint ballot of the Senators, and Representatives in Convention, but shall not be eligible more than five years successively.

To give bond.
[Shall keep his office at Seat of Govt. See Laws, ch. 212, Vol. 3, p. 42.]

SEC. 2. The Treasurer shall, before entering on the duties of his office, give bond to the State with sureties, to the satisfaction of the Legislature, for the faithful discharge of his trust.

Not to engage in business of trade, &c.

SEC. 3. The Treasurer shall not, during his continuance in office, engage in any business of trade or commerce, or as a broker, nor as an agent or factor for any merchant or trader.

No money to be drawn but by warrant, &c.

SEC. 4. No money shall be drawn from the Treasury, but by warrant from the Governor and Council, and in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money, shall be published at the commencement of the annual session of the Legislature.

ARTICLE VI.

JUDICIAL POWER.

SEC. 1. The Judicial power of this State shall be vested

in a Supreme Judicial Court, and such other courts as the Legislature shall from time to time establish.

Supreme and other Courts.

SEC. 2. The Justices of the Supreme Judicial Court shall, at stated times, receive a compensation, which shall not be diminished during their continuance in office, but they shall receive no other fee or reward.

Compensation.

SEC. 3. They shall be obliged to give their opinion upon important questions of law, and upon solemn occasions, when required by the Governor, Council, Senate or House of Representatives.

To give opinion on questions of law at the Governor, &c.

SEC. 4. All Judicial officers, except Justices of the Peace, shall hold their offices during good behavior, but not beyond the age of seventy years.

Tenure of Judicial officers.

SEC. 5. Justices of the Peace and Notaries Public, shall hold their offices during seven years if they so long behave themselves well, at the expiration of which term, they may be re-appointed or others appointed, as the public interest may require.

Justices of the Peace and Notaries.

SEC. 6. The Justices of the Supreme Judicial Court shall hold no office under the United States, nor any State, nor any other office under this State, except that of Justice of the Peace.

Justices of Supreme Judicial Court to hold no other office.

ARTICLE VII.

MILITARY.

SEC. 1. The captains and subalterns of the Militia shall be elected by the written votes of the members of their respective companies. The field officers of regiments by the written votes of the captains and subalterns of their respective regiments. The Brigadier Generals in like manner, by the field officers of their respective brigades.

Officers, by whom elected.

SEC. 2. The Legislature shall, by law, direct the manner of notifying the electors, conducting the elections, and making the returns to the Governor of the officers elected; and, if the electors shall neglect or refuse to make such elections, after being duly notified according to law, the Governor shall appoint suitable persons to fill such offices.

Notify electors, &c.

[See Laws, ch. 164, § 10, Vol. 2.]

Major Generals, Adjutant General, &c.

[Tenure of office of Adj. General. See Laws, ch. 424, Vol. 8, p. 268.]

SEC. 3. The Major Generals shall be elected by the Senate and House of Representatives, each having a negative on the other. The Adjutant General and Quarter-master General shall be appointed by the Governor and Council; but the Adjutant General shall perform the duties of Quartermaster General, until otherwise directed by law. The Major Generals and Brigadier Generals, and the commanding officers of regiments and battalions shall appoint their respective staff-officers (t); and all military officers shall be commissioned by the Governor.

Organization of the Militia.

SEC. 4. The militia, as divided into divisions, brigades, regiments, battalions and companies pursuant to the laws now in force, shall remain so organized, until the same shall be altered by the Legislature.

Persons who may be exempted from Military duty.

[See Laws, ch. 164, § 2, Vol. 2.]

SEC. 5. Persons of the denominations of Quakers and Shakers, Justices of the Supreme Judicial Court and Ministers of the Gospel may be exempted from military duty, but no other person of the age of eighteen and under the age of forty-five years, excepting officers of the Militia, who have been honorably discharged, shall be so exempted, unless he shall pay an equivalent to be fixed by law.

ARTICLE VIII.

LITERATURE.

Legislature to require of towns to support public schools.
[See Laws, ch. 117, Vol. 2.]

A general diffusion of the advantages of education being essential to the preservation of the rights and liberties of the people; to promote this important object, the Legislature are authorized, and it shall be their duty to require, the sev-

(t) 1. Division Inspectors, Division Quartermasters, Brigade Majors, Brigade Quartermasters, and Adjutants and Quartermasters of Regiments and Battalions, are Staff Officers. 2 *Glf. App.* 432.

2. But the promotion, resignation or removal of the officer, making such appointments, does not operate to render vacant the several staff-offices, with the power of appointing to which he was vested. *Ib.*

3. The class of staff-officers denominated "*Aids*," continue in office during the pleasure of the persons making the appointments. And the tenure of their offices is determined by the promotion, resignation or removal of such person. *Ib. and Laws, Ch. 164, § 2, Vol. 2.*

eral towns to ~~make~~ suitable provision, at their own expense, for the support and maintenance of public schools ; and it shall further be their duty to encourage and suitably endow, from time to time, as the circumstances of the people may authorize, all academies, colleges and seminaries of learning within the State : *Provided*, That no donation, grant or endowment shall at any time be made by the Legislature, to any Literary Institution now established, or which ~~may~~ hereafter be established, unless, at the time of making such endowment, the Legislature of the State shall have the right to grant any further powers to, alter, limit or restrain any of the powers vested in, any such literary institution, as shall be judged necessary to promote the best interests thereof.

May endow colleges, &c.

Proviso.

ARTICLE IX.

GENERAL PROVISIONS.

SEC. 1. Every person elected or appointed to either of the places or offices provided in this Constitution, and every person elected, appointed, or commissioned to any Judicial, Executive, Military, or other office under this State, shall, before he enter on the discharge of the duties of his place (u) or office, take and subscribe the following oath or affirmation :
 " I do swear, that I will support the Constitution of the United States and of this State, so long as I shall continue a citizen thereof. So help me God."

Oaths and subscriptions.

" I do swear, that I will faithfully discharge, to the best of my abilities, the duties incumbent on me as according to the Constitution and the laws of the State. So help me God : " *Provided*, That an affirmation in the above forms may be substituted, when the person shall be conscientiously scrupulous of taking and subscribing an oath.

The oaths or affirmations shall be taken and subscribed by the Governor and Counsellors before the presiding officer of the Senate, in the presence of both Houses of the Legislature, and by the Senators and Representatives before

Before whom to be taken.

(u) See note j 2, Art. III, § 2, p. 23, of this Constitution.

the Governor and Council, and by the residue of said officers before such persons as shall be prescribed by the Legislature ; and whenever the Governor or any Counsellor shall not be able to attend during the session of the Legislature to take and subscribe said oaths or affirmations, such oaths or affirmations may be taken and subscribed in the recess of the Legislature before any Justice of the Supreme Judicial Court : *Provided*, that the Senators and Representatives, first elected under this Constitution, shall take and subscribe such oaths or affirmations before the President of the Convention.

Persons disqualified to be members of the Legislature.

SEC. 2. No person holding the office of Justice of the Supreme Judicial Court, or of any inferior Court, Attorney General, County Attorney, Treasurer of the State, Adjutant General, Judge of Probate, Register of Probate, Register of Deeds, Sheriffs or their deputies, Clerks of the Judicial Courts, shall be a member of the Legislature ; and any person holding either of the foregoing offices, elected to, and accepting a seat in the Congress of the United States, shall thereby vacate said office ; and no person shall be capable of holding or exercising, at the same time, within this State, more than one of the offices before mentioned.

From holding more than one office.

Commissions.

SEC. 3. All Commissions shall be in the name of the State, signed by the Governor, attested by the Secretary or his deputy, and have the seal of the State thereto affixed.

Elections on the first Wednesday of January may be adjourned from day to day.

SEC. 4. And in case the elections, required by this Constitution on the first Wednesday of January annually, by the two Houses of the Legislature, shall not be completed on that day, the same may be adjourned from day to day, until completed, in the following order : the vacancies in the Senate shall first be filled ; the Governor shall then be elected, if there be no choice by the people ; and afterwards the two Houses shall elect the Council.

Every civil officer may be removed by impeachment or address.

SEC. 5. Every person holding any civil office under this State, may be removed by impeachment, for misdemeanor in office ; and every person holding any office, may be removed by the Governor with the advice of the Council, on the address of both branches of the Legislature. But before

such address shall pass either House, the causes of removal shall be stated and entered on the journal of the House in which it originated, and a copy thereof served on the person in office, that he may be admitted to a hearing in his defence.

SEC. 6. The tenure of all offices, which are not or shall not be otherwise (u) provided for, shall be during the pleasure of the Governor and Council.

Tenure of office.

SEC. 7. While the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years.

Valuation.

SEC. 8. All taxes upon real estate, assessed by authority of this State, shall be apportioned and assessed equally, according to the just value thereof.

Real estate to be taxed according to its value.

ARTICLE X.

SCHEDULE.

SEC. 1. The first Legislature shall meet on the last Wednesday in May next. The elections on the second Monday in September annually shall not commence until the year one thousand eight hundred and twenty-one, and in the mean time the election for Governor, Senators and Representatives shall be on the first Monday in April, in the year of our Lord one thousand eight hundred and twenty, and at this election the same proceedings shall be had as are required at the elections, provided for in this Constitution on the second Monday in September annually, and the lists of the votes for the Governor and Senators shall be transmitted, by the town and plantation clerks respectively, to the Secretary of State *pro tempore*, seventeen days at least before the last Wednesday in May next, and the President of the Convention shall, in presence of the Secretary of State, *pro tempore*, open and examine the attested copies of said lists so returned for Senators, and shall have all the powers, and be subject to all the duties, in ascertaining, notifying, and summoning the Senators, who appear to be elected, as the Governor and Council have, and are subject to, by this Constitution: *Provided*, he shall notify said Senators fourteen days at least before the last Wednesday in May, and vacancies shall be ascertained

Meeting of first Legislature.

Elections for 1820.

(u) See Laws, ch. 257, Vol. 3, p. 87.

**Senators ap-
portioned.** and filled in the manner herein provided ; and the Senators to be elected on the said first Monday of April, shall be apportioned as follows :

The County of York shall elect three. .
 The County of Cumberland shall elect three.
 The County of Lincoln shall elect three.
 The County of Hancock shall elect two.
 The County of Washington shall elect one.
 The County of Kennebec shall elect three.
 The County of Oxford shall elect two.
 The County of Somerset shall elect two.
 The County of Penobscot shall elect one.

**And represen-
tatives.** And the members of the House of Representatives shall be elected, ascertained, and returned in the same manner as herein provided at elections on the second Monday of September, and the first House of Representatives shall consist of the following number, to be elected as follows :

York.

COUNTY OF YORK.

The towns of York and Wells may *each* elect two representatives ; and each of the remaining towns may elect one.

Cumberland.

COUNTY OF CUMBERLAND.

The town of Portland may elect three representatives ; North-Yarmouth, two ; Brunswick, two ; Gorham, two ; Freeport and Pownal, two ; Raymond and Otisfield, one ; Bridgton, Baldwin and Harrison, one ; Poland and Danville, one ; and each remaining town one.

Lincoln.

COUNTY OF LINCOLN.

The towns of Georgetown and Phippsburg, may elect one representative ; Lewiston and Wales, one ; St. George, Cushing and Friendship, one ; Hope and Appleton Ridge, one ; Jefferson, Putnam and Patricktown Plantation, one ; Alna and Whitefield, one ; Montville, Palermo and Montville plantation, one ; Woolwich and Dresden, one ; and each remaining town one.

Hancock.

COUNTY OF HANCOCK.

The town of Bucksport may elect one representative ; Deer Island, one ; Castine and Brooksville, one ; Orland and Penobscot, one ; Mount Desert and Eden, one ; Vinal-

haven and Islesborough, one ; Sedgwick and Bluehill, one ; Gouldsborough, Sullivan and plantations No. 8 and 9 north of Sullivan, one ; Surry, Ellsworth, Trenton and plantation of Mariaville, one ; Lincolnville, Searsmont and Belmont, one ; Belfast and Northport, one ; Prospect and Swanville, one ; Frankfort and Monroe, one ; Knox, Brooks, Jackson and Thorndike, one.

COUNTY OF WASHINGTON.

Washington.

The towns of Steuben, Cherryfield and Harrington, may elect one representative ; Addison, Columbia and Jonesborough, one ; Machias, one ; Lubec, Dennysville, plantations No. 9, No. 10, No. 11, No. 12, one ; Eastport, one ; Perry, Robinston, Calais, plantations No. 3, No. 6, No. 7, No. 15, and No. 16, one.

COUNTY OF KENNEBEC.

Kennebec.

The towns of Belgrade and Dearborn may elect one representative ; Chesterville, Vienna and Rome, one ; Wayne and Fayette, one ; Temple and Wilton, one ; Winslow and China, one ; Fairfax and Freedom, one ; Unity, Joy and Twenty-five-mile pond plantation, one ; Harlem and Malta, one ; and each remaining town one.

COUNTY OF OXFORD.

Oxford.

The towns of Dixfield, Mexico, Weld and Plantations No. 1 and 4, may elect one representative ; Jay and Hartford, one ; Livermore, one ; Rumford, East Andover and Plantations Nos. 7 and 8, one ; Turner, one ; Woodstock, Paris and Greenwood, one ; Hebron and Norway, one ; Gilead, Bethel, Newry, Albany and Howard's Gore, one ; Porter, Hiram and Brownfield, one ; Waterford, Sweden and Lovell, one ; Denmark, Fryeburg and Fryeburg addition, one ; Buckfield and Sumner, one.

COUNTY OF SOMERSET.

Somerset.

The town of Fairfield may elect one representative ; Norridgewock and Bloomfield, one ; Starks and Mercer, one ; Industry, Strong and New-Vineyard, one ; Avon, Phillips, Freeman and Kingfield, one ; Anson, New-Portland, Embden and Plantation No. 1, one ; Canaan, Warsaw, Palmyra, St. Albans and Corinna, one ; Madison, Solon, Bingham,

Moscow and Northhill, one ; Cornville, Athens, Harmony, Ripley, and Warrenstown, one.

Penobscot.

COUNTY OF PENOBSBOT.

The towns of Hampden and Newburg may elect one representative ; Orrington, Brewer, and Eddington and Plantations adjacent on the east side of Penobscot river, one ; Bangor, Orono and Sunkhaze Plantation, one ; Dixmont, Newport, Carmel, Hermon, Stetson, and Plantation No. 4, in the 6th range, one ; Levant, Corinth, Exeter, New-Charlestown, Blakesburg, Plantation No. 1 in 3d range, and Plantation No. 1 in 4th range, one ; Dexter, Garland, Guilford, Sangerville, and Plantation No. 3, in 6th range, one ; Atkinson, Sebec, Foxcroft, Brownville, Williamsburg, Plantation No. 1, in 7th range, and Plantation No. 3, in 7th range, one.

Powers and duties of Secretary of State pro tem. in relation to the votes.

And the Secretary of State *pro tempore* shall have the same powers, and be subject to the same duties, in relation to the votes for Governor, as the Secretary of State has, and is subject to, by this Constitution : and the election of Governor shall, on the said last Wednesday in May, be determined and declared, in the same manner, as other elections of Governor are by this Constitution ; and in case of vacancy in said office, the President of the Senate, and Speaker of the House of Representatives, shall exercise the office as herein otherwise provided, and the Counsellors, Secretary and Treasurer, shall also be elected on said day, and have the same powers, and be subject to the same duties, as is provided in this Constitution ; and in case of the death or other disqualification of the President of this Convention, or of the Secretary of State *pro tempore*, before the election and qualification of the Governor or Secretary of State under this Constitution, the persons to be designated by this Convention at their session in January next, shall have all the powers and perform all the duties, which the President of this Convention, or the Secretary *pro tempore*, to be by them appointed, shall have and perform.

Duration of the first Legislature.

SEC. 2. The period for which the Governor, Senators and Representatives, Counsellors, Secretary and Treasurer, first elected or appointed, are to serve in their respective of-

fices and places, shall commence on the last Wednesday in May, in the year of our Lord one thousand eight hundred and twenty, and continue until the first Wednesday of January, in the year of our Lord one thousand eight hundred and twenty-two.

SEC. 3. All laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature, or shall expire by their own limitation.

Laws now in force continue until repealed.

SEC. 4. The Legislature, whenever two thirds of both Houses shall deem it necessary, may propose amendments to this Constitution ; and when any amendments shall be so agreed upon, a resolution shall be passed and sent to the selectmen of the several towns, and the assessors of the several plantations, empowering and directing them to notify the inhabitants of their respective towns and plantations, in the manner prescribed by law, at their next annual meetings in the month of September, to give in their votes on the question, whether such amendment shall be made ; and if it shall appear that a majority of the inhabitants voting on the question are in favor of such amendment, it shall become a part of this Constitution.

Constitution how it may be amended.

SEC. 5. All officers provided for in the sixth section of an act of the Commonwealth of Massachusetts, passed on the nineteenth day of June, in the year of our Lord one thousand eight hundred and nineteen, entitled "An act relating to the separation of the District of Maine from Massachusetts Proper, and forming the same into a separate and Independent State," shall continue in office as therein provided ; and the following provisions of said act shall be a part of this Constitution, subject however to be modified or annulled as therein is prescribed, and not otherwise, to wit :

Persons in office to continue to hold their offices.

"SEC. 1. Whereas it has been represented to this Legislature, that a majority of the people of the District of Maine are desirous of establishing a separate and Independent Government within said District: Therefore,

Part of a Law of Massachusetts made a part of the Constitution.

"Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That the consent of this Commonwealth be, and the same is hereby given, that the District of Maine may be formed and erected into a separate and Independent State, if the people of the said District shall in the manner, and by the majority hereinafter mentioned, express their consent and agreement thereto, upon the following terms and condi-

tions: And, provided the Congress of the United States shall give its consent thereto, before the fourth day of March next: which terms and conditions are as follows, viz.

[See ch. 194,
Vol. 8, p. 17,
" ch. 322,
ib. p. 169,
" ch. 390,
ib. p. 238.]

"*First.* All the lands and buildings belonging to the Commonwealth, within Massachusetts Proper, shall continue to belong to said Commonwealth, and all the lands belonging to the Commonwealth, within the District of Maine, shall belong, the one half thereof, to the said Commonwealth, and the other half thereof, to the State to be formed within the said District, to be divided as is hereinafter mentioned; and the lands within the said District, which shall belong to the said Commonwealth, shall be free from taxation, while the title to the said lands remains in the Commonwealth; and the rights of the Commonwealth to their lands, within said District, and the remedies for the recovery thereof, shall continue the same, within the proposed State, and in the Courts thereof, as they now are within the said Commonwealth, and in the Courts thereof; for which purposes, and for the maintenance of its rights, and recovery of its lands, the said Commonwealth shall be entitled to all other proper and legal remedies, and may appear in the Courts of the proposed State and in the Courts of the United States, holden therein; and all rights of action for, or entry into lands, and of actions upon bonds, for the breach of the performance of the condition of settling duties, so called, which have accrued, or may accrue, shall remain in this Commonwealth, to be enforced, commuted, released, or otherwise disposed of, in such manner as this Commonwealth may hereafter, determine: *Provided however*, That, whatever this Commonwealth may hereafter receive or obtain on account thereof if any thing, shall, after deducting all reasonable charges relating thereto, be divided, one third part thereof to the new State, and two third parts thereof to this Commonwealth.

"*Second.* All the arms which have been received by this Commonwealth from the United States, under the law of Congress, entitled, "An act making provision for arming and equipping the whole body of militia of the United States, passed April the twenty third, one thousand eight hundred and eight, shall, as soon as the said District shall become a separate State, be divided between the two States, in proportion to the returns of the militia, according to which, the said arms have been received from the United States, as aforesaid.

"*Third.* All money, stock, or other proceeds, hereafter derived from the United States, on account of the claim of this Commonwealth, for disbursements made, and expenses incurred, for the defence of the State, during the late war with Great Britain, shall be received by this Commonwealth, and when received, shall be divided between the two States, in the proportion of two thirds to this Commonwealth, and one third to the new State.

"*Fourth.* All other property, of every description, belonging to the Commonwealth, shall be holden and receivable by the same, as a fund and security, for all debts, annuities, and Indian subsidies, or claims due by said Commonwealth; and within two years after the said District shall have become a separate State, the Commissioners to be appointed as hereinafter provided, if the said States cannot otherwise agree, shall assign a just portion of the productive property, so held by said Commonwealth as an equivalent and indemnification to said Commonwealth, for all such debts, annuities, or Indian subsidies or claims, which may then remain due, or unsatisfied: and all the surplus of the said property, so holden, as aforesaid, shall be divided between the said Commonwealth and the said District of Maine, in the proportion of two thirds to the said Commonwealth, and one third to the said District—and if, in the judgment of the said Commissioners, the whole of said property, so held, as a fund and security, shall not be sufficient indemnification for the purpose, the said District shall be liable for and shall pay to said Commonwealth, one third of the deficiency.

"*Fifth.* The new State shall, as soon as the necessary arrangements can be made for that purpose, assume and perform all the duties and obligations of this Commonwealth, towards the Indians within said District of Maine, whether the same arise from treaties, or otherwise; and for this purpose shall obtain the assent of said Indians, and their release to this Commonwealth of claims and stipulations arising under the treaty at present existing between the said Commonwealth and said Indians; and as an indemnification to such new State, therefor, this Commonwealth, when such arrangements shall be completed, and the said duties and obligations assumed, shall pay to said new State, the value of thirty thousand dollars, in manner following, viz: The said Commissioners shall set off by metes and bounds, so much of any part of the land, within the said District, falling to this Commonwealth, in the division of the public lands, hereinafter provided for, as in their estimation shall be of the value of thirty thousand dollars; and this Commonwealth shall, thereupon, assign the same to the said new State, or in lieu thereof, may pay the sum of thirty thousand dollars at its election; which election of the said Commonwealth, shall be made within one year from the time that notice of the doings of the Commissioners, on this subject, shall be made known to the Governor and Council; and if not made within that time, the election shall be with the new State.

"*Sixth.* Commissioners, with the powers and for the purposes mentioned in this act, shall be appointed in manner following: The Executive authority of each State shall appoint two; and the four so appointed, or the major part of them, shall appoint two more; but if they cannot agree in the appointment, the Executive of each State shall appoint one in addition; not however, in that case, to be a citizen of its own State. And any vacancy happening with respect to the Commissioners, shall be supplied in the manner provided for their original appointment; and, in addition to the powers herein before given to said Commissioners, they shall have full power and authority to divide all the public lands within the District, between the respective States, in equal shares, or moieties, in severalty, having regard to quantity, situation and quality; they shall determine what lands shall be surveyed and divided, from time to time, the expense of which surveys, and of the Commissioners, shall be borne equally by the two States. They shall keep fair records of their doings, and of the surveys made by their direction, copies of which records, authenticated by them, shall be deposited from time to time, in the archives of the respective States; transcripts of which, properly certified, may be admitted in evidence, in all questions touching the subject to which they relate. The Executive authority of each State may revoke the power of either or both its Commissioners; having, however, first appointed a substitute, or substitutes, and may fill any vacancy happening with respect to its own Commissioners; four of said Commissioners shall constitute a quorum, for the transaction of business; their decision shall be final, upon all subjects within their cognizance. In case said commission shall expire, the same not having been completed, and either State shall request the renewal or filling up of the same, it shall be renewed or filled up in the same manner, as is herein provided for filling the same, in the first instance, and with the like powers; and if either State shall, after six months' notice, neglect or refuse to appoint its Commissioners, the other may fill up the whole commission.

"*Seventh (v).* All grants of land, franchises, immunities, corporate or other

(v.) 1. A grant by Massachusetts, of lands in this State, previous to the separation, is impeachable for fraud, in the Courts of this State; notwithstanding the general language of condition 7, in the Act of Separation. *Lapish v. Wells*, 6 Giff. 175.

2. Whether the "grants" &c. mentioned in the seventh condition can be extended beyond the immediate acts of the Legislature, so as to include lands conveyed by the deeds of the committee on Eastern Lands, *substantur*. *Id.*

rights, and all contracts for, or grants of land not yet located which have been or may be made by the said Commonwealth, before the separation of said District shall take place, and having or to have effect within the said District, shall continue in full force, after the said District shall become a separate State. But the grant which has been made to the President and Trustees of Bowdoin College, out of the tax laid upon the Banks within this Commonwealth, shall be charged upon the tax upon the Banks within the said District of Maine, and paid according to the terms of said grant; and the President and Trustees, and the Overseers of said College, shall have, hold and enjoy their powers and privileges in all respects; so that the same shall not be subject to be altered, limited, annulled or restrained, except by judicial process, according to the principles of law; and in all grants hereafter to be made by either State, of unlocated land within the said District, the same reservations shall be made for the benefit of Schools, and of the Ministry, as have heretofore been usual, in grants made by this Commonwealth. And all lands heretofore granted by this Commonwealth, to any religious, literary, or eleemosynary corporation or society, shall be free from taxation, while the same continues to be owned by such corporation, or society.

"*Eighth.* No laws shall be passed in the proposed State, with regard to taxes, actions, or remedies at law, or bars, or limitations thereof, or otherwise making any distinction between the lands and rights of property of proprietors not resident in, or not citizens of the proposed State, and the lands and rights of property of the citizens of said proposed State, resident therein; and the rights and liabilities of all persons, shall, after the said separation, continue the same as if the said District was still a part of this Commonwealth, in all suits pending, or judgments (w) remaining unsatisfied on the fifteenth day of March next, where the suits have been commenced in Massachusetts Proper, and process has been served within the District of Maine; or commenced in the District of Maine, and process has been served in Massachusetts Proper, either by taking bail, making attachments, arresting and detaining persons, or otherwise, where execution remains to be done; and in such suits, the Courts within Massachusetts Proper, and within the proposed State, shall continue to have the same jurisdiction as if the said District had still remained a part of the Commonwealth. And this Commonwealth shall have the same remedies within the proposed State, as it now has, for the collection of all taxes, bonds, or debts, which may be assessed, due, made, or contracted, by, to, or with the Commonwealth, on or before the said fifteenth day of March, within the said District of Maine; and all officers within Massachusetts Proper and the District of Maine shall conduct themselves accordingly.

"*Ninth.* These terms and conditions, as here set forth, when the said District shall become a separate and Independent State, shall, *ipso facto* be incorporated into, and become and be a part of any Constitution, provisional or other, under which the Government of the said proposed State, shall, at any time hereafter, be administered; subject however, to be modified, or annulled by the agreement of the Legislature of both the said States; but by no other power or body whatsoever."

SEC. 6. This Constitution shall be enrolled on parchment, deposited in the Secretary's Office, and be the supreme law of the State, and printed copies thereof shall be prefixed to the books containing the laws of this State.

Done in Convention, October 29, 1819.

WILLIAM KING, { *President of the Convention
and member from Bath.*

Attest, ROBERT C. VOSE, *Secretary.*

Constitution
to be enrolled
on parchment.

(w.) See notes to § 34, ch. 89, of this volume.

respectively, two days at least before he or they shall be tried for the same: and that all persons so accused and indicted for any treason, as aforesaid, or for misprision of treason, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them at any such trial or trials, as is usually granted to compel witness to appear against them.

CH. 2.

[Ib. § 17.]

SECT. 7. *Be it further enacted*, That no person or persons whatsoever shall be indicted, tried or prosecuted for any treason, or for misprision of treason, that shall be committed or done in violation of this Act, unless the indictment for the same be found within three years next after the treason done or committed. [Approved March 19, 1821.]

No persons to be indicted after three years next following the offence.

[Ib. § 20.]

Chapter 2.*

[*53]

AN ACT providing for the punishment of the crimes of Murder, Manslaughter, felonious Maims and Assaults, and Duelling, and for the prevention thereof.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, (a) That if any person shall commit the crime of wilful murder, or shall be present, aiding and abetting, in the commission of such crime, or not being present, shall have been accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done, every such offender, who in the Supreme Judicial Court, shall be duly convicted of either of the felonies and offences aforesaid, shall suffer the punishment of death. And the Justices of the said Court, before whom the conviction shall be in cases of murder committed in a duel shall, and in other cases may, at their discretion, further sentence and order the body of such convict to be dissected and anatomized. And in case of further sentence, it shall be the

Punishment of murder or being accessory thereto before the fact.

[Mass. Stat. March 15, 1805, § 1.]

Court may order body of convict to be dissected.

(a) 1. If one counsel another to commit suicide, and the other, by reason of such advice, kills himself, the adviser is guilty of murder as principal. *Com. vs. Bowen*, 13 Mass. 356.

2. Accessories to felonies are made triable before or after conviction of the principal, by Ch. 504, Vol. 3, p. 352.

CH. 1. years, at the discretion of the Court before whom he shall be convicted.

Crime and punishment of misprision of Treason.

[Ib. § 5.]

SECT. 3. *Be it further enacted,* That any person who shall know of any Treason to be committed (and is no party or consenter to it) and shall not, within a reasonable time, give information thereof, upon oath, to one of the Justices of the Supreme Judicial Court, or some Justice of the Peace within this State, to the end the offender or offenders therein may be apprehended and be amenable to Justice, shall be taken and deemed to be guilty of misprision of treason or concealment of treason.

[*52]

Person indicted to have copy of indictment two days before arraignment.

[Ib. § 10.]

Counsel to be assigned.

SECT. 4. *Be it further enacted,* That all and every person and persons whatsoever, that shall be accused and indicted for treason,* or for misprision of treason, shall have a true copy of the whole indictment delivered unto them, or any of them, two full days at least, before he or they shall be arraigned for the same, whereby to enable them, and any of them, respectively, to advise with, counsel thereupon, to plead and make their defence, and in case any person or persons, so accused and indicted, shall desire counsel, the Court before whom such person or persons shall be tried, or some Judge of that Court, shall, and is hereby authorized and required, immediately upon his or their request, to assign to such person or persons, such and so many counsel not exceeding two, as the person or persons shall desire to whom such counsel shall have free access at all seasonable hours.

Oaths of two witnesses necessary in case of misprision of Treason—unless, &c.

[Ib. § 11.]

SECT. 5. *Be it further enacted,* That no person or persons whatsoever shall be indicted, tried or convicted of misprision of treason, but by and upon the oaths and testimony of two lawful witnesses, either both of them to the same overt act, or one of them to one, and the other of them to another overt act of the same species of treason, unless the party indicted and arraigned, or tried, shall willingly without violence, in open Court confess the same.

Prisoners to have copy of panel of jurors two days before trial; and compulsory process for witnesses.

SECT. 6. *Be it further enacted,* That all and every person and persons who shall be accused, indicted and tried for treason, as aforesaid, or for misprision of treason, shall have copies of the panel of the Jurors who are to try them, delivered unto them and every of them so accused and indicted

respectively, two days at least before he or they shall be tried for the same: and that all persons so accused and indicted for any treason, as aforesaid, or for misprision of treason, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them at any such trial or trials, as is usually granted to compel witness to appear against them.

CH. 2.

[Ib. § 17.]

SECT. 7. *Be it further enacted*, That no person or persons whatsoever shall be indicted, tried or prosecuted for any treason, or for misprision of treason, that shall be committed or done in violation of this Act, unless the indictment for the same be found within three years next after the treason done or committed. [Approved March 19, 1821.]

No persons to be indicted after three years next following the offence.

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Chapter 2.*

[*53]

AN ACT providing for the punishment of the crimes of Murder, Maaslaughter, felonious Maims and Assaults, and Duelling, and for the prevention thereof.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, (a) That if any person shall commit the crime of wilful murder, or shall be present, aiding and abetting, in the commission of such crime, or not being present, shall have been accessary thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done, every such offender, who in the Supreme Judicial Court, shall be duly convicted of either of the felonies and offences aforesaid, shall suffer the punishment of death. And the Justices of the said Court, before whom the conviction shall be in cases of murder committed in a duel shall, and in other cases may, at their discretion, further sentence and order the body of such convict to be dissected and anatomized. And in case of further sentence, it shall be the

Punishment of murder or being accessary thereto before the fact.

[Mass. Stat. March 15, 1905, § 1.]

Court may order body of convict to be dissected.

(a) 1. If one counsel another to commit suicide, and the other, by reason of such advice, kills himself, the adviser is guilty of murder as principal. *Com. vs. Bowen*, 13 Mass. 356.

2. Accessaries to felonies are made triable before or after conviction of the principal, by Ch. 504, Vol. 3, p. 352.

CH. 2. duty of the sheriff to deliver the body of the convict, being dead, to a professor of anatomy and surgery in some public college or seminary, when it shall be required in his behalf, and otherwise to any surgeon or surgeons, who shall be attending at the place of execution, to receive the body, and will engage for the dissection and anatomizing thereof.

Sheriff may deliver dead body for that purpose.

SECT. 2. *Be it further enacted,* That if any person, after a wilful murder done and committed as aforesaid, shall be accessary thereto, by knowingly receiving, harboring, comforting, concealing, maintaining, or otherwise unlawfully assisting any principal offender, or accessary therein before the fact ; every such accessary after the fact, who shall be thereof duly convicted in the Supreme Judicial Court, shall be

Punishment of accessaries after the fact.

[Ib. § 2.]

[†Solitary imprisonment abolished; See Laws, ch. 368, § 3, Vol. 3, p. 221.]

punished by solitary imprisonment† for such term, not exceeding six months, and by confinement afterwards to hard labor, for such term, not exceeding ten years, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the nature and aggravation of the offence.

[*54]

Punishment of manslaughter.

[† See § 2.]

[Ib. § 3.]

SECT.* 3. *Be it further enacted,* That if any person shall commit the crime of manslaughter, and shall be thereof duly convicted, every such offender shall be punished by solitary imprisonment,† for such term not exceeding six months, and by confinement afterwards to hard labor, for such term not exceeding ten years, as the Court before whom the conviction may be, shall sentence and order ; or by fine not exceeding one thousand dollars, and imprisonment in the common gaol, for a term not exceeding three years, at the discretion of the Court, before whom the conviction may be.

Punishment for maiming, or being accessary.

[Ib. § 4.]

SECT. 4. *Be it further enacted,* That if any person, with set purpose and aforethought malice, or intention to maim or disfigure, shall unlawfully cut (b) out or disable the tongue, put out an eye, cut off an ear, slit the nose, or cut off the nose or lip, or cut off or disable a limb, or member of any person, every such offender, and every person privy to the intent aforesaid, who shall be present, aiding and abetting in

(b) The breaking and entering a dwelling house, with intent to cut off an ear of an inhabitant, is not felony. *Com. vs. Newell, et al. 7 Mass. 245.*

the commission of such offence, or not being present, shall have counselled, hired or procured the same to be done, upon due conviction thereof in the Supreme Judicial Court, shall be punished by solitary imprisonment† for such term, not exceeding one year, and by confinement to hard labour, or by imprisonment in the common gaol for such term, not exceeding ten years, commencing from the expiration of such solitary imprisonment, as the Justices of the said Court before whom the conviction may be, shall sentence and order, according to the nature and aggravation of the offence.

CH. 2.

[† See § 2.]

SECT. 5. *Be it further enacted*, That if any person being armed with a dangerous weapon, and with intent to commit murder, shall assault another, every such offender, and every person present aiding and abetting, or who shall be accessory before the fact, to the commission of the offence aforesaid, by counselling, hiring, or procuring the same to be done and committed, and who shall be thereof duly convicted, shall be punished by solitary imprisonment† for such term, not exceeding one year, and by confinement afterwards to hard labour, for such term, not exceeding twenty years, as the Court before whom the conviction may be, shall sentence and order.

Punishment for assault with intent to murder, and being accessory.

[† See § 2.]

SECT.* 6. *Be it further enacted*, That if any person with a dangerous weapon, and with an intention to maim or disfigure in any of the modes, mentioned in the fourth section of this act, shall assault (c) another ; or shall be present, aiding or abetting therein, or not being present, shall have counselled, hired or procured the same to be done, every such offender, who shall be thereof duly convicted, in the Supreme Judicial Court, shall be deemed a felonious (d) assaulter, and shall be punished by solitary imprisonment,† for such term, not exceeding six months, and by confinement afterwards to hard

[*55]

Punishment for assault with intent to maim, &c. and being accessory.

[Mass. Stat. March 15, 1905, § 5.]

[† See § 2.]

(c) When an indictment and a civil action are pending at the same time for the same assault and battery, the court will not stay proceedings on the indictment, if the party injured is not to be used as a witness for the government. *Com. vs. Elliot, et als.* 2 Mass. 372.

(d) The word "felonious" is descriptive of the temper, disposition and character of the offender, and not of the legal nature of the offence. *Com. vs. Newell, et al.* 7 Mass. 249.

CH. 2.



labor, or by imprisonment in the common gaol, for such term, not exceeding four years, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the nature and aggravation of the offence.

Punishment for duelling, giving a challenge or acting as second or abettor.

[Mass. Stat. March 15, 1806, § 6.]

[†See note (d) on preceding page.]

Conviction, shall disqualify from holding any office for 20 years.

Punishment for accepting a challenge.

[1b. § 7.]

Conviction shall disqualify for holding any office for five years.

[*56]

Punishment for concealing pregnancy, or delivery of a bastard.

[Mass. Stat. Feb 26, 1786, § 1.]

SECT. 7. *Be it further enacted*, That if any person shall voluntarily engage in a duel, with rapier, or small sword, back sword, pistol, or other dangerous weapon, to the hazard of life, when no homicide shall ensue thereon; and if any person shall, by word, message, or in any other manner, challenge another to fight in a duel, as aforesaid, when no duel shall be fought thereon, every such offender, and every person, who shall be knowingly a second, agent or abettor in such duel or challenge, upon due conviction of either of the said offences in the Supreme Judicial Court, shall be punished as a felonious† assaulter; and for his further punishment, shall be disqualified from holding, and incapable of any office or place of honor, profit or trust under this State, during the term of twenty years from and after such conviction.

SECT. 8. *Be it further enacted*, That if any person shall accept a challenge to a duel, and shall consent to fight therein as aforesaid, when no duel shall thereupon ensue, every such offender, and every person who shall knowingly be a second, agent or abettor in such acceptance of a challenge, upon due conviction thereof in the Supreme Judicial Court, shall be punished by imprisonment in the common gaol, not exceeding one year, and shall be disqualified from holding, and incapable of any office or place of honour, profit or trust under this State, during the term of five years from and after such conviction.

SECT.* 9. *Be it further enacted*, That if any woman shall conceal her pregnancy, and shall willingly be delivered in secret by herself, of any issue of her body, male or female which shall by law, be a bastard, every such woman so offending, shall pay a fine not exceeding the sum of one hundred dollars, to the use of the State; to be recovered by information or indictment in any Court proper to try the said offence, or imprisoned, not exceeding three months, at the discretion of the Court.

SECT. 10. *Be it further enacted*, That if any woman shall endeavor privately, either by herself, or the procurement of others, to conceal the death of any such issue of her body, which, if it were born alive, would by law be a bastard, so that it may not come to light, whether it were born alive or not, or whether it was murdered, or not, in every such case, the mother, so offending, shall be punished by solitary imprisonment† for a term not exceeding three months, and confinement to hard labour, for a term not exceeding five years, at the discretion of the Court.

CH. 3.

Punishment for endeavouring to conceal the death of such child.

[Ib. § 2.]

[† Sec § 2.]

SECT. 11. *Be it further enacted*, That if the Grand Jury shall, in the same indictment, charge any woman with the wilful murder of her infant bastard child, as well as with either or both the offences aforesaid, and it appear to the Jury of trials that she is guilty of the murder charged, she shall be thereupon convicted of murder and suffer the pains of death as in case of murder ; but if it doth not appear to the same Jury that she is guilty of the murder charged in the indictment, but only of either or both the offences aforesaid, then the same Jury may acquit her of the charge of murder, and find her guilty of the aforesaid offences or either of them, as the case may be. [Approved February 28, 1821.]

A woman indicted for murder of such child, &c. what proceedings shall be had.

[Ib. § 3.]

Chapter 3.

AN ACT providing for the punishment of Rape, and for the prevention thereof.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled, &c.*

[Mass. Stat. March 13, 1806, § 1.]

[Sec. 1. repealed by ch. 430, § 5, Vol. 3. p. 273, which is substituted.

It provided for the punishment of rape, and of accessaries thereto *before* the fact, by death.]

SECT.* 2. *Be it further enacted*, That if any person, after any rape committed as aforesaid, shall knowingly harbour, conceal, maintain or assist any principal offender therein, or any accessary thereto, before the fact, and shall be thereof duly convicted in the Supreme Judicial Court, every such

[*57]

Punishment of accessaries after the fact.

[Ib. § 2.]

CH. 3.

[† Solitary imprisonment abolished. See Laws, ch. 868, § 3, Vol. 3, p. 221.]

Punishment of assault, with intent to commit a rape, on woman, or child of 10 or more years old.

[lb. § 3.]

[† See § 2.]

Punishment for an assault, with such intent, on a female child under ten years old.

[† See § 2.]

[*58]

[Mass. Stat. Feb. 10, 1816.]

accessary after the fact, shall be punished by solitary confinement,† for such term, not exceeding three months, and by confinement to hard labour, for such term thereafter commencing, not exceeding ten years, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

SECT. 3. *Be it further enacted*, That if any man, with intent (a) to commit a rape as aforesaid, shall make an assault upon a woman or female child of the age of ten years and upwards, every such offender, and any person who shall consent, aid or assist therein, and shall be thereof duly convicted in the Supreme Judicial Court, shall be adjudged guilty of a felonious assault, and shall be punished by solitary imprisonment,† for such term, not exceeding three months, and by confinement afterwards to hard labour, for such term not exceeding ten years, or by a fine not exceeding five hundred dollars, and by imprisonment in the common gaol for such term not exceeding one year, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the nature and aggravation of the offence.

SECT. 4. *Be it further enacted*, That when any person shall be convicted in the Supreme Judicial Court of having made an assault on any female child under the age of ten years, with an intent to commit a rape, he shall be punished by solitary imprisonment,† not exceeding four months, and afterwards* by confinement to hard labour, for any term of years, or for life, according to the circumstances and aggravation of the offence, as the Court in their discretion may think proper. [Approved February 28, 1821.]

(a) Where one is indicted for a rape, and the jury cannot agree to convict him, they may find him guilty of an assault with intent to commit a rape. *Com. vs. Cooper*, 15 Mass. 187.

Chapter 4.

CH. 4.

AN ACT providing for the punishment of incendiaries, and the perpetrators of other malicious mischief.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, &c.

[Sec. 1, repealed by ch. 480, § 2, Vol. 3, p. 273. See same ch. § 4.

It provided for the punishment by death, of both the principal, and accessories before the fact, to the burning of a dwelling house in the night time.]

[Mass. Stat. March 16, 1805, § 1.]

SECT. 2. *Be it further enacted,* That if any person shall wilfully and maliciously burn, in the day time, the dwelling house (a) of another, or any out building adjoining to such dwelling house, or any other building, whereby such dwelling house shall be burnt; or if any person shall wilfully and maliciously set fire to any meeting house, church, court house, town house, college, academy, or other building erected for public uses, or to the store, barn or stable of another, within the curtilage of any dwelling house, and by the kindling of such fire, such meeting house, or other building, erected for public uses, or such store, barn or stable, shall be burnt in the night time, every such offender, and any person present, aiding, abetting or consenting in the commission of such offence, or accessory thereto before the fact, by counselling, hiring or procuring the same to be done, who shall be duly convicted before the Supreme Judicial Court of either of the felonies and offences aforesaid, shall be punished by solitary imprisonment† for such term not exceeding one year, as the Justices * of the said Court, before whom the conviction may be, shall sentence and order, and by confinement afterwards to hard labor for life.

Punishment for burning dwelling house &c. in day time.

[Ib. § 2.]

Or public buildings or, stores, barns, &c. in night time;

or being accessory, before the fact.

[† Solitary imprisonment abolished. See Laws, ch. 368, § 2, Vol. 3, p. 221.]

[*59]

SECT. 3. *Be it further enacted,* That if any person shall wilfully and maliciously burn, in the day time, any meeting house or other building erected for public uses, or any store, barn or stable of another, within the curtilage of any dwelling house: or if any person shall wilfully and maliciously burn, by night or day, any other store, barn, stable, house or building whatsoever, or any ship or vessel lying in the body of any county; every such offender, and any person

[Ib. § 3.]

for burning such buildings in day time.

(a.) If any part of a dwelling house, however small, be wilfully and maliciously consumed by fire, the offence of arson is complete. *Com. vs. Shaack*, 16 Mass. 105.

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[† See § 1.]

aiding or consenting in the commission of such offence, who shall be duly convicted thereof before the Supreme Judicial Court, shall be punished by solitary imprisonment,† for such term, not exceeding one year, and by confinement afterwards to hard labor for such term, not exceeding ten years, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the nature and aggravation of the offence.

—for burning
corn, hay, fences,
lumber,
&c.

[Ib. § 4.]

—killing,
wounding or
disfiguring cattle,
horses and
sheep.

SECT. 4. *Be it further enacted*, That if any person shall wilfully and maliciously burn any stack of corn, hay, grain, straw, cornstalks, flax, fences, piles of wood, boards, or other lumber; or any soil, grass, trees, poles or underwood, of another; and if any person shall wilfully and maliciously, passionately, cruelly or barbarously kill, wound, maim, or disfigure any one or more of the horses, sheep or cattle of another, every such offender, and any person aiding and consenting in the commission of such offence, who shall be duly convicted thereof before the Supreme (b) Judicial Court, shall be punished by solitary imprisonment for such term, not exceeding six months; and by confinement afterwards to hard labor for such term not exceeding three years, or by fine not exceeding five hundred dollars, and by imprisonment† in the common gaol, not exceeding one year, at the discretion of the Justices of the said Court, before whom the conviction may be, and as they shall sentence and order, according to the nature and aggravation of the offence.

[† See § 1.]

[*60]

Punishment of
accessaries
after the fact.

[Ib. § 5.]

[Accessory
may be convicted before
conviction of
the principal.
See ch. 504,
Vol. 3, p. 352.]

SECT. 5. *Be it further enacted*, That if any person, after any felony or offence done and committed, by any incendiary in any manner as aforesaid, shall knowingly harbour, conceal, maintain,* assist or relieve such offender, or any accessory before the fact, in any such felony or offence, every such accessory after the fact, who shall be duly convicted thereof, before the Supreme Judicial Court, shall be punished by solitary imprisonment,† for a term not exceeding one month, and by confinement afterwards to hard labour for a term not exceeding five years; or by a fine not exceeding one thousand dollars, and by imprisonment in the common gaol, not exceeding one year, at the discretion of the Justices of

(b) Or C. C. Pleas. See ch. 233, Vol. 3, p. 63.

†See § 1.

the said Court, before whom the conviction may be, and as they shall sentence and order thereupon, according to the nature and aggravation of the offence (c).

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SECT. 6. *Be it further enacted*, That if any person or persons shall wittingly and willingly set fire to any woods or lands, lying in common, or to woodland, or other land held in severalty and not his own, within this State without leave first had and obtained from the owners of the land or those who have a right to give the same leave, excepting in cases in which it may become necessary to make back fires to stop the progress or subdue any fire that may be spreading, the person so offending shall forfeit and pay for each offence, ten dollars, one moiety thereof to the use of the State and the other moiety thereof to the use of him or them that shall inform and sue for the same; and shall be liable, in a special action on the case, to pay damages to all persons injured by such fire, including the injury which may be done by any necessary back fire made for the purpose aforesaid. And in case any person under age shall offend against this section, such penalty shall be recovered of the parent or master respectively, of such person under age, unless it shall appear such person under age was employed or directed by some person, other than the parent or master; in which case the person so employing or directing shall be liable therefor; and the fines in this section mentioned may be recovered in an action of debt, with costs of suit.

Punishment for wilfully setting fire to woods without leave.

[Mass. Stat. March 10, 1797, § 7.]

liable in damages also.

Parents or masters of minors offending liable in certain cases.

SECT. 7. *Be it further enacted*, That if any person shall cruelly beat any horse or cattle, and be thereof convicted, before a Justice of the Peace, he shall be punished by fine not less than two dollars nor more than five dollars, or by imprisonment* in the common gaol for a term not exceeding thirty days, according to the aggravation of the offence. [Approved February 24, 1821.]

Punishment for cruelly beating horses or cattle.

[*61]

(c) The words of § 5 are satisfied by confining them to the offences described in § 1 and 2; and they do not extend to the offences prohibited in § 3 and 4, which are misdemeanors, not felonies. *Com. vs. Macomber*, 3 Mass. 254.

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Chapter 5.

AN ACT against Sodomy and Bestiality.

Sodomy.

[Mass. Stat.
March 16,
1806.]

Punishment.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That if any man shall commit the crime against nature with a man or male child, or any man or woman shall have carnal copulation with a beast, every such offender, being duly convicted thereof in the Supreme Judicial Court, shall be punished by solitary imprisonment, for such term, not exceeding one year, and by confinement afterwards to hard labor for such term, not exceeding ten years, as the Justices of said Court, before whom the conviction may be shall sentence and order. [Approved Feb. 19, 1821.]

Chapter 6.

AN ACT providing for the punishment of the Crimes of Burglary and other breaking and entering of buildings.

Burglary committed with a dangerous weapon, or an actual assault, and being accessory before the fact.

[Mass. Stat.
March 13,
1806, § 1.][Punishment
modified, See
ch. 430, § 2,
Vol. 3, p 272.]

[*62]

SECT. 1. BE it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person with intent to kill, rob, steal, commit a rape, or to do, or perpetrate any other felony, shall, in the night time, break and enter, or having with such felonious intent, entered, shall in the night time break a dwelling house, any person then being lawfully therein, and such offender being, at the time of such breaking or entering, armed with a dangerous weapon, or arming himself or herself in such house, with a dangerous weapon or committing an actual assault upon any person lawfully being in such house ; every such offender, and any person present, aiding, assisting or consenting in such burglary, or accessory thereto before the fact, by counselling, hiring or procuring such burglary to be committed, who shall* be duly convicted thereof in the Supreme Judicial Court, shall suffer the punishment of death.

SECT. 2. Be it further enacted, That if any person, with intent to kill, rob, steal, commit a rape, or to do or perpe-

trate any other felony, shall, in the night time, break and enter, or having, with such felonious intent entered, shall in the night time break a dwelling house, without being armed with a dangerous weapon, or without arming himself, or herself in such house with a dangerous weapon, and without committing an assault upon any person lawfully being in such house; every such offender and every person present, aiding and abetting in such burglary, or accessory thereto before the fact, by counselling, hiring or procuring such burglary to be committed, who shall be duly convicted thereof in the Supreme Judicial Court, shall be punished by solitary imprisonment for such term not exceeding two years, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, and by confinement afterwards to hard labour for life.

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the offence, when not so armed, and no assault is made

[Ib. § 2.]

[Accessories before the fact.

[Punishment modified, See ch. 480, § 2, Vol. 3, p. 272.]

SECT. 3. *Be it further enacted*, That if any person, after any burglary committed as aforesaid, shall knowingly harbor, conceal, maintain, or assist any principal offender, or accessory thereto before the fact: every such accessory after the fact, who shall be thereof duly convicted in the Supreme Judicial Court, shall be punished by solitary imprisonment,† for such term not exceeding three months, and by confinement afterwards to hard labour, for such term not exceeding ten years, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

Punishment of accessories after the fact.

[Ib. § 3.]

[†See Laws, ch. 363, § 3, Vol. 3, p. 221.]

SECT. 4. *Be it further enacted*, That if any person, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall, in the night time, enter without breaking, or in the day time break and enter, any dwelling house, or any out-house thereto adjoining and occupied therewith, or any office, shop or warehouse or any ship or vessel lying within the body of a County: every such offender and every person present, aiding or abetting in the commission of such offence, or who shall have counselled, hired, or procured the same to be committed, being thereof duly convicted* in the Supreme Judicial Court, shall be punished by solitary imprisonment,† for such term not exceeding six

Punishment when offender enters dwelling house with such intent in the night time without breaking, or in the day time by breaking, &c.

[Ib. § 4.]

[*63]

[†See § 3.]

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Chapter 7.

AN ACT providing for the punishment of the crimes of Robbery and other larcenies, and for the prevention thereof (a).

Jurisdiction of
Courts over
larcenies.

[Mass. Stat.
Mar. 16, 1806,
§ 2.]

Justs. of Peace
to have concur-
rent jurisdic-
tion of larcen-
ies not ex-
ceeding five
dollars.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That the Supreme Judicial Court shall have exclusively the jurisdiction of all larcenies where the money (b), goods or other article or articles stolen, shall be alleged to exceed (c) in amount or value, the sum of one hundred dollars, the said Supreme Judicial Court and the Circuit Courts of Common Pleas, within their respective Counties, shall have concurrent jurisdiction of all larcenies, where the money, goods or other article or articles stolen, shall not be alleged to exceed in amount or value, the sum of one hundred dollars ; and every Justice of the Peace, within his proper County, shall have concurrent jurisdiction with the said Courts, of all larcenies, where the money, goods or other article or articles stolen, shall not be

(a) 1. A person stealing goods in any other State, and bringing them into this State, (Maine) may be indicted here (Mass.) for the larceny. *Com. vs. Andrews*, 2 *Mass.* 19.

2. So where the stealing was in one county, and the goods were brought by others into another county, who were there joined by the original thief. *Com. vs. Dewitt*, 10 *Mass.* 154.

(b) In an indictment for stealing money, the *value* must be averred. *Com. vs. Smith et al.* 1 *Mass.* 245.

(c) The C. C. Pleas have concurrent jurisdiction with the S. Court of all offences described in this Statute, excepting those in § 7 and 9. See *ch.* 233, *Vol.* 3, p. 68.

alleged to exceed in amount or value, the sum of five dollars. And any person duly convicted before a Justice of the Peace of any larceny, either as principal or as accessory before or after the fact, shall be punished by such fine, not exceeding five dollars, and imprisonment in the common gaol for such term not exceeding twenty days, either or both, as the said justice, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

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Mode of punishment before Jus. of Peace.

SECT. 2. *Be it further enacted*, That any person who shall feloniously steal, take and carry away of the property of another, any money,† goods (*d*), or chattels, or any bond, promissory* note, bill of exchange, or other bill, order or certificate, or any book of accounts for or respecting any money or goods, due or becoming due and payable, or to be delivered, or any deed or writing containing a conveyance of lands or other real estate, or any other valuable contract remaining in force, or any receipt, release or defeasance, or any writ, process, or public record, shall be deemed guilty of the crime of larceny; and every such offender, and any person present, aiding and abetting in any such larceny, or accessory (*e*) thereto before the fact, by counselling, hiring or otherwise procuring the same to be done, who, before any Court having jurisdiction thereof, shall be duly convicted of either of the felonies and offences aforesaid, shall be punished, when the money, goods, or other article or articles stolen, shall not exceed in amount or value the sum of one hundred dollars, by solitary imprisonment† for a term not exceeding six months, and by confinement afterwards to hard labour for a term not exceeding one year, or by a fine not exceeding one hundred dollars and imprisonment in the common gaol for a term not exceeding one year. And when the money,

Punishment of simple larceny.

[Ib. § 1.]

[*64]

[† See note (*b*) on next preceding page.]

Being accessory before the fact.

[† See Laws, ch. 368, § 3, Vol. 3, p. 221.]

(*d*) 1. Where a miller, having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaister of paris, it was held to be larceny. *Com. vs. James*, 1 Pick. 375.

2. If a carrier, entrusted with goods to transport to a certain place, fraudulently take any part of them and convert them to his own use, it is felony. *Com. vs. Brown*, 4 Mass. 580. *Dame vs. Baldwin*, 8 Mass. 518.

(*e*) Accessories to all felonies are punishable without a conviction of the principal, by Ch. 504, § 1 and 3, Vol. 3, p. 352.

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goods or other article or articles stolen, shall exceed in amount or value, the sum of one hundred dollars, then by solitary imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term not exceeding three years, to be ordered by the Court before whom the conviction may be, according to the degree and aggravation of the offence.

Punishment on a second conviction as principal or accessory.

[Ib. § 2.]

[See § 2.]

SECT. 3. *Be it further enacted*, That if any person having been before convicted of the crime of larceny, or as accessory thereto before the fact, shall afterwards commit or shall be alike accessory to another larceny, and shall be duly convicted thereof, before the Supreme Judicial Court; or if any person before the Supreme Judicial Court at one and the same term thereof, shall be duly convicted as principal or as accessory before the fact, in three distinct larcenies, every such offender shall be punished as a common and notorious thief, by solitary† imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term not less than three years and not exceeding fifteen years, to be ordered as aforesaid.

[*65]

Punishment for breaking and entering shop, warehouse or office in night time.

[Ib. § 4.]

[See § 2.]

SECT.* 4. *Be it further enacted*, That if any person in the night time, shall break and enter any shop, warehouse or office, not adjoining to, or occupied with, a dwelling house, or any ship or vessel, lying within the body of a County, and shall there commit a larceny, every such offender, and every person present, aiding, and abetting in the commission of such felony, or accessory thereto before the fact, by counselling; hiring or procuring the same to be committed, and being thereof duly convicted before the Supreme Judicial Court, shall be punished by solitary† imprisonment for such term not exceeding one year, and confinement afterwards to hard labour for such term, not exceeding fifteen years, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

Punishment for entering a dwelling house

SECT. 5. *Be it further enacted*, That if any person in the night time, shall enter, without breaking, or in the day

time, shall break (e) and enter any dwelling house, or out houses thereto adjoining, and occupied therewith, or any office, shop (f), warehouse, ship or vessel, as aforesaid, the owner or other person being therein, and put in fear, every such offender, and any person present, aiding and abetting in the commission of such felony, or accessory thereto before the fact, by counselling, hiring or otherwise procuring the same to be done, upon due conviction thereof in the Supreme Judicial Court, shall be punished by solitary† imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term not exceeding ten years, to be ordered as aforesaid.

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&c. in night without breaking, or in day time breaking and entering.

[Ib. § 5.]

[†Sec § 2.]

SECT. 6. *Be it further enacted*, That if any person shall in the day time commit any larceny in any dwelling house, office, shop, warehouse, ship or vessel, as aforesaid, or in the night time shall break and enter any church, meeting-house, court-house, town-house, college or academy, or other building erected for public uses, or any mill, malt-house, store, barn or stable, and shall commit any larceny therein, or shall be aiding and abetting in the commission of such felony, or shall be accessory thereto before the fact, by counselling hiring or otherwise procuring the same to be done, every such offender, upon conviction of either of the felonies aforesaid,* in the Supreme‡ Judicial Court, shall be punished by solitary† imprisonment for a term not exceeding six months, and by confinement afterwards to hard labour, for a term not exceeding five years, to be ordered as aforesaid.

Punishment for larceny in dwellinghouse, shop, office, &c. in day time, or breaking and entering in night, a church or other public building, or store, barn, &c.

[Ib. § 6.]

[*66]

[†See note (c) § 1.]

[†Sec § 2.]

SECT. 7. *Be it further enacted*, That any person, who shall by force and violence, or by other assault and putting in fear, feloniously steal, rob and take from the person of another, any money or goods, bank note, bill of exchange or

Punishment for robbery, without a dangerous weapon, nor intent to kill, &c.

(e) 1. Removing a plank which is loose, and is not fixed to the freehold in a partition wall of a building, is not a *breaking* within the Statute. *Com. vs. Trimmer & al.* 1 Mass. 476.

2. In an indictment for shop-breaking and stealing from the shop, proof that part of the goods taken were found in the possession of the defendant, is *prima facie* evidence, that the defendant is guilty of the whole charge in the indictment. *Com. vs. Millard*, 1 Mass. 6.

(f) *Com. vs. McMonagle*, 1 Mass. 517; *Com. vs. Lindsey*, 10 Mass. 153.

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[Ib. § 7.]

other negotiable bill, note or order, due or in force, or any other property which may be the subject of larceny, shall be adjudged guilty of the crime of robbery; and every such offender, and any person present, aiding and abetting in the commission of such felony, or accessory thereto before the fact, by counselling, hiring or procuring the same to be done, who in the Supreme Judicial Court, shall be duly convicted of either of the felonies and offences aforesaid, shall be punished by solitary† imprisonment for such term, not exceeding two years, and by confinement afterwards to hard labour for life (g).

Punishment of robbery, armed with dangerous weapon, and intent to kill, &c.

[Mass. Stat. Feb. 19, 1819, § 1.]

[Punishment of death, abolished, ch. 430, Vol. 3 p. 271.]

Punishment of assault with intent to rob—offender being armed with a dangerous weapon.

SECT. 8. *Be it further enacted*, That if any person shall commit an assault upon another, and shall rob, steal and take from his person, any money, goods or chattels, or any property which may be the subject of larceny, such robber being, at the time of committing such assault, armed with a dangerous weapon, with intent to kill or maim the person so assaulted and robbed; or if any such robber, being armed as aforesaid, shall actually strike or wound the person, so assaulted and robbed; every person so offending, and every person present, aiding and abetting in the commission of such felony, or who shall be accessory thereto before the fact, by counselling, hiring or procuring the same to be done and committed, and who shall be duly convicted thereof, shall suffer the punishment of death (h).

SECT. 9. *Be it further enacted*, That if any person being armed with a dangerous weapon, and with intent to commit robbery, shall assault another, every such offender, and every person present, aiding and abetting, or who shall be acces-

(g) 1. A larceny committed with actual force and violence, or with a constructive force by any assault and putting in fear, is to be adjudged robbery. *Com. vs. Humphries*, 7 Mass. 244.

2. In an indictment for such an offence, an allegation of force and violence is sufficient, without alleging that the party robbed was put in fear. *ib.*

(h) It is sufficient within the meaning of § 8, that the party be armed with a dangerous weapon, with intent to kill or maim the person assaulted by him, in case such killing or maiming should be necessary to his purpose of robbing, and that he have the power of executing such intent. *Com. vs. Martin*, 17 Mass. 359.

sary before the fact, to the commission of the offence aforesaid, by counselling, hiring or procuring the same to be done and committed, and who shall be thereof duly convicted, shall* be punished by solitary† imprisonment for such term, not exceeding one year, and by confinement afterwards to hard labour for such term, not exceeding twenty years, as the Court, before whom the conviction may be, shall sentence and order.

SECT. 10. *Be it further enacted*, That if any person shall commit any other larceny from the person of another, either openly and violently, or privily and fraudulently, every such offender, and any person present, aiding and abetting in the commission of such felony, or accessory thereto before the fact, by counselling, hiring or otherwise procuring the same to be done, who shall be duly convicted in the Supreme‡ Judicial Court, shall be punished by solitary imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term not exceeding five years, to be ordered by the Justices of the said Court, before whom the conviction may be, according to the aggravation of the offence.

SECT. 11. *Be it further enacted*, That if any person with a dangerous weapon, or other actual violence, and with intent to steal, in manner as aforesaid, shall assault another, every such offender, and any person present, aiding and assisting therein, or who shall have counselled or procured the same to be done, shall be deemed a felonious assaulter; and upon due conviction thereof in the Supreme‡ Judicial Court, shall be punished by solitary† imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term, not exceeding ten years, to be ordered as aforesaid.

SECT. 12. *Be it further enacted*, That if any person shall knowingly harbour, conceal or maintain any principal felon or accessory before the fact, in any robbery or larceny, committed in any manner as aforesaid, or shall receive (i) or

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[Ib. § 3.]

[*67]

[† See § 2.]

Punishment of any other larceny from person.

[Mass. Stat. March 16, 1805, § 8.]

[† See note (c) § 1.]

Punishment of assault with violence, or dangerous weapon, with intent to steal.

[Ib. § 9.]

[† See note (c) § 1.]

[† See § 2.]

Punishment of accessories to robbery or larceny, after the fact.

(i) 1. A person receiving in this State, (Mass.) goods stolen in another State, knowing them to be stolen, may be indicted here (Mass.) as a receiver of stolen goods. *Com. vs. Andrews*, 2 Mass. 19.

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[Ib. § 10.]

[† See § 2.]

[*68]

shall aid in concealing any money, goods or other article stolen as aforesaid, knowing the same to have been so stolen, in any such manner as aforesaid, every such offender upon due conviction of either of the offences as aforesaid, shall be deemed an accessory after the fact to the same robbery or larceny, and shall be punished by solitary† imprisonment for such term not exceeding six months and by confinement* afterwards to hard labour for such term not exceeding three years, or by a fine not exceeding five hundred dollars, and by imprisonment in the common gaol, for such term not exceeding three years, or either of them, as the Justices of the Court, before whom the conviction may be, shall and may sentence and order, according to the nature and aggravation of the offence.

Accessory to such felony may be prosecuted for misdemeanor, though principal is not convicted or prosecuted.

[Ib. § 11.]

SECT. 13. *Be it further enacted*, That any person charged with the receipt or concealment of money, goods or other article stolen in any manner as aforesaid, knowing the same to have been stolen, may be prosecuted therefor as for a misdemeanor, although the principal felon chargeable, or charged with the larceny, shall not have been prosecuted or convicted; and upon due conviction thereof before any Court having jurisdiction of the principal offence, shall be punished in the same degree and manner, as an accessory after the fact might be, being alike convicted; but after prosecution for such misdemeanor, the person charged shall not be liable to be prosecuted as an accessory after the fact in the same larceny.

Punishment on a second conviction as receiver of stolen goods, or on conviction of three distinct offences of same kind, at same term. [† See note (c) § 1.]

[Ib. § 12.]

SECT. 14. *Be it further enacted*, That if any person, having been before convicted as a receiver of money, goods or other articles stolen in any manner as aforesaid, shall afterwards knowingly receive or aid in the concealment of any other money, goods or other articles stolen, and shall be duly convicted thereof before the Supreme† Judicial Court; or if any person shall be alike duly convicted before the Supreme Judicial Court, in the same term thereof, as a receiver-

2. A person receiving at the same time and in the same package, a quantity of stolen goods, the property of several persons, knowing them to be stolen, is guilty of several offences, for which there may be several indictments and convictions. *ib.* 409.

er of any money, goods or other articles aforesaid, stolen in any manner as aforesaid, in three distinct acts of receiving or concealing as aforesaid, every such offender shall be deemed a common receiver of stolen goods, and shall be punished by solitary† imprisonment for such term, not exceeding one year, and by confinement afterwards to hard labour for such term, not less than three years, and not exceeding ten years, as the Justices of the said Court, before whom the conviction may be shall sentence and order, according to the nature and aggravation of the offence.

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[† See § 2.]

SECT. 15. *Be it further enacted*, That when any person, convicted for the first offence as a receiver of stolen goods, or as* accessory, after the fact, in any simple larceny and not adjudged to be a common receiver of stolen goods, shall make satisfaction to the party injured by such larceny to the full amount of the money, goods or articles stolen and not restored, the Justices of the Court before whom the conviction may be, shall exempt such receiver and accessory from the penalty of confinement to hard labour.

[*69]

Case, in which Court may exempt convict from punishment by hard labour.

[Ib. § 13.]

SECT. 16. *Be it further enacted*, That in every case of a conviction of larceny as aforesaid, the Justices of the Court before whom the conviction may be, shall have authority, at the prayer of the prosecutor therein, and at their discretion, to order for him or her a meet recompense, not exceeding his or her actual expenses, with a reasonable allowance for time and trouble in such prosecution, to be paid by the County Treasury; and all payments which shall be made by any County Treasurer, pursuant to any order which may be granted as aforesaid, shall be the proper charge of this State, and shall be allowed in the manner which is or shall be provided for the reimbursement to the several Counties of other costs arising in criminal prosecutions.

Court may allow compensation to prosecutor for time and trouble.

[Ib. § 14.]

—same to be charged to the State.

SECT. 17. *Be it further enacted*, That it shall be the duty of any Sheriff or other officer who shall be charged with, or lawfully employed in, apprehending and arresting any person accused of the crime of larceny or robbery, or as accessory therein, in any manner as aforesaid, to seize and secure the money, goods or other articles aforesaid, alleged to be stolen or to have been obtained by such larceny or robbery.

Sheriff when he arrests a person accused—to seize goods, &c. and make inventory of them, annexed to his return.

[Ib. § 15.]

CH. 7.

Sheriff accountable for such goods, &c.

[*70]
on conviction to be delivered to owner.

Convicts sentenced to hard labour, to be charged with value of goods stolen and not restored,

[1b. § 16.]

to be paid from his earnings, &c.

Court may empower owner of goods to dispose of convict in service—in case.

Proviso.

ry, and which shall be found in the possession of such accused person, or which shall be waived by him or her in flying from justice. And of the money, goods or other articles aforesaid, which shall be so found and secured, a true inventory or schedule shall be made in, or annexed to the return of such Sheriff or other officer, upon the warrant or process which shall have been issued for the arrest of any person accused as aforesaid; and such Sheriff or other officer shall be accountable for the money, goods or other articles thereby seized and secured. And whenever the conviction of any person accused as aforesaid, shall be had upon the prosecution, and by the care and diligence of the owner of any money, goods or articles, found and seized as aforesaid, such owner* shall and may have restitution thereof immediately after such conviction, by an order in open Court, or by a writ of restitution, as the case may require.

SECT. 18. *Be it further enacted*, That whenever, upon any conviction as aforesaid, such convict shall be sentenced to confinement to hard labour, such owner prosecuting as aforesaid, shall be allowed against each and every convict, the full amount or value of the money, goods or other articles stolen or obtained by such larceny, and not restored or satisfied for, to be charged against such convict at his or her place of confinement under such sentence, and to be paid from his or her net earnings, as the same shall accrue, and so far as they may extend. And when such convict shall be sentenced to fine or imprisonment in the common gaol, he or she shall be required by the sentence to pay to such owner prosecuting as aforesaid, the full amount or value of the money, goods or other article or articles stolen and not restored or satisfied for; and if any such convict shall be unable to make restitution, or pay the amount or value as aforesaid, the Justices of the Court before whom the conviction may be, may further sentence and order him or her to make satisfaction to such owner by service, who shall thereupon be empowered to take such convict in service, or to dispose of him or her to any person for such term of time, not exceeding three years, as shall be ordered by the said Justices: *Provided however*, That no such convict shall be held

in gaol for such satisfaction of the amount or value, as aforesaid, for a longer term than thirty days, unless such owner shall give security to the keeper of the gaol, to satisfy the charge of keeping such prisoner from and after that time, according to the rate allowed for keeping prisoners in the same gaol; and if such owner shall refuse or neglect so to do, and shall not take or dispose of such prisoner, the keeper shall no longer keep such prisoner for that purpose, but may set him or her at liberty, after the expiration of the term of imprisonment, if any, ordered by the sentence, and after the payment of the costs of Court, and his own charges of imprisonment; and if he or she be unable to pay the same, upon application by the keeper of the gaol to any two Justices* of the quorum, within the same County, they are hereby empowered to determine the sum to be paid, and to order such prisoner to make satisfaction by service, for such reasonable time, not exceeding two years, as they may assign, for which time the keeper may thereupon dispose of such prisoner in service to any citizen of the United States: And if he or she cannot be so disposed of, after being confined three months, for costs, or fine and costs only, the Justices of the Circuit Court of Common Pleas, within and for the same County, may, at their discretion, order such prisoner to be discharged upon such security as they may judge proper (j).

[*71]

SECT. 19. *Be it further enacted*, That when any person, charged with the crime of larceny, or as an accessory therein, or as a receiver of money, goods or other articles stolen as aforesaid, shall and may be let to bail, the recognisance for the appearance of such person, shall be taken, with sufficient surety, or sureties, in such sum as may be reasonably required for that purpose; with a further additional sum which shall be double the amount or value of the money,

Person charged with larceny, &c. to recognize in double the value of the goods—besides to secure their appearance.

[Ib. § 17.]

(j) *When one convicted of larceny was sentenced to pay treble damages to the owner of the goods, and the owner neglected to dispose of him in service or to give security to the gaoler, for the charge of keeping the prisoner after thirty days had expired, and he was afterwards discharged by order of the court, it was holden that the owner could not maintain an action of debt against the convict for the damages. Smith vs. Drew, 5 Mass. 514.*

CH. 7.

Sheriff ac-
countable for
such goods,
&c.

[*70]
on conviction
to be delivered
to owner.

Convicts sen-
tenced to hard
labour, to be
charged with
value of goods
stolen and not
restored,

[lb. § 16.]

to be paid from
his earnings,
&c.

Court may em-
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Proviso.

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- CH. 8. goods or articles charged to have been stolen or obtained by such larceny ; and when such recognisance shall be forfeited by default, the Justices of the Court before whom judgment may be rendered thereon, shall order the amount or value of the money, goods, or other articles stolen or obtained as aforesaid, to be paid out of the sum which shall be collected on such recognisance, to the owner of such money, goods or other articles, provided he shall have been the prosecutor. [Approved March 19, 1821.]

Chapter 8.

[Mass. Stat.
July 3, 1782.]

AN ACT against Blasphemy, and profane Cursing and Swearing.

Crime of blas-
phemy de-
scribed.

[*72]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world, or by cursing, or reproaching* Jesus Christ, or the Holy Ghost, or by cursing or contumeliously reproaching the holy word of God, that is, the canonical scriptures, contained in the Books of the Old and New Testaments, or by exposing them, or any part of them, to contempt and ridicule ; which books are as follows : Genesis, Exodus, Leviticus, Numbers, Deuteronomy, Joshua, Judges, Ruth, Samuel, Samuel, Kings, Kings, Chronicles, Chronicles, Ezra, Nehemiah, Esther, Job, Psalms, Proverbs, Ecclesiastes, the Song of Solomon, Isaiah, Jeremiah, Lamentations, Ezekiel, Daniel, Hosea, Joel, Amos, Obadiah, Jonah, Micah, Nahum, Habakkuk, Zephaniah, Haggai, Zechariah, Malachi, Matthew, Mark, Luke, John, Acts, Romans, Corinthians, Corinthians, Galatians, Ephesians, Phillipians, Collossians, Thessalonians, Thessalonians, Timothy, Timothy, Titus, Philemon, Hebrews, James, Peter, Peter, John, John, John, Jude, Revelations ; every person so offending, shall be punished by solitary† imprisonment for a term not exceeding three months, and confinement to hard la-

Punishment.
[†abolished ;
See Laws, ch.
368, § 3, Vol.
3, p. 221.]

bour, for a term not exceeding five years. And whereas the horrible practice of profane cursing and swearing is inconsistent with the dignity and rational cultivation of the human mind, with a due reverence of the Supreme Being and his Providence, and hath a natural tendency to weaken the solemnity and obligation of oaths, lawfully taken in the administration of justice ; to promote falsehood, perjury, blasphemy, and dissoluteness of manners, and to loosen the bonds of civil society :

CH. 8.

SECT. 2. *Be it therefore enacted*, That if any person, who has arrived at the age of discretion, shall profanely curse or swear, and shall be thereof convicted, such person, so offending, shall forfeit and pay a sum not exceeding two dollars, nor less than one dollar, according to the aggravation of the offence and the quality and circumstances of the offender, in the judgment of the Court, or Justice of the Peace before whom the conviction may be ; and in case the same person shall, after one conviction as aforesaid, offend a second time, such offender shall forfeit and pay, upon such second conviction, double the sum forfeited on the first conviction ; and in case the same person shall, after two convictions, as aforesaid, again offend, such offender shall forfeit and pay, upon each and every subsequent conviction, treble the sum forfeited* on the first conviction, one moiety, of the forfeitures aforesaid, to be to the use of the town, in which the offence shall be committed, and the other moiety thereof to the use of the person or persons, who shall make complaint thereof, or prosecute for the same ; and provided also such prosecution be commenced within twenty days after the offence be committed. [Approved February 24, 1821.]

Punishment of profane cursing and swearing.

[Mass. Stat. June 29, 1798.]

Double penalty on second conviction.

Treble penalty on third conviction.

[*73]

Limitation of prosecution.

CH. 9.

Chapter 9.

[Mass. Stat.
Mar. 8, 1792,
and Mar. 11,
1797, and Feb.
16, 1816.]

AN ACT providing for the due observation of the Lord's Day.

Preamble.

WHEREAS the observance of the Lord's day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labour and the cares of business ; for moral reflections and conversation on the duties of life, and the frequent errors of human conduct ; for public and private worship of the Maker, Governor and Judge of the world ; and for those acts of charity which support and adorn a Christian Society : And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian Society : to the great disturbance of well disposed persons, and to the great injury of the community, by producing dissipation of manners and immoralities of life.

Travelling,
teaming, &c.
on Lord's day
prohibited.

Penalty, how
recovered and
applied.

Limitation of
prosecution.

Business and
amusements
unlawful.

[*74]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That no traveller, drover, waggoner, teamster, or any of their servants, shall travel on the Lord's day, or any part thereof (a), (except from necessity or charity) under a penalty not less than four dollars nor more than six dollars and sixty-six cents ; which penalty may be recovered with costs of prosecution, upon complaint (b) before any Justice of the Peace in the County where the offence may be committed ; one moiety thereof to the complainant and the other moiety to the use of the County within which the offence may be committed ; or before the Circuit Court of Common Pleas of the same County by presentment of the grand Jury, in which case the whole penalty shall enure to the benefit of the County : *Provided however,* That all prosecutions for the said penalty shall be commenced within six months after the offence was committed, unless the offender resides without the State.

SECT. 2. *Be it further enacted,* That no person or persons whatsoever shall keep open his, her, or their shop, warehouse,* or workhouse, nor shall, upon land or water, do any

(a) This phrase has reference to Sunday evening, not Saturday evening. *Com. vs. Newton*, 8 *Pick.* 234.

(b) In a proceeding before a Justice of the Peace for an offence, the fact must be strictly charged, but a rigid adherence to forms will not be required : Thus, in a complaint for Sabbath breaking, it is sufficient to allege the fact on the Lord's day generally, and to conclude the complaint "against the statute enacted for the due observation of the Lord's day : " So if the complaint does not shew on whose behalf it complains, nor what the defendant has forfeited, nor how the forfeiture is appropriated. *Com. vs. Messenger*, 4 *Mass.* 462.

manner of labour, business (c), or work, (works of necessity and charity only excepted) nor be present at any concert of music, dancing or any public diversion, show or entertainment, nor use any sport, game, play, or recreation on the Lord's day, or any part thereof, upon penalty of a sum not exceeding six dollars and sixty-six cents, nor less than four dollars for each offence.

CH. 9.

SECT. 3. *Be it further enacted*, That no vintner, retailer of strong liquors, innholder or other person keeping a house of public entertainment, shall entertain or suffer any of the inhabitants of the respective towns where they dwell, or others not being travellers (d), strangers, or lodgers in such houses, to abide and remain in their houses, yards, orchards, or fields, drinking or spending their time either idly or at play or doing any secular business on the Lord's day or any part thereof, on penalty of three dollars and thirty-three cents, payable by such vintner, retailer or innholder, or person keeping such house of entertainment, for each person so entertained or suffered ; and every person so drinking or abiding (except as aforesaid,) shall pay a fine not less than two dollars, nor more than four, for each offence ; and every such licensed person, upon any conviction after the first, shall pay a fine of six dollars and sixty-six cents, for each offence ; and having been three times convicted, shall be debarred from renewing his license forever after. And although it is the sense of this Legislature, that the time commanded in the sacred Scriptures to be observed as holy time, includes a natural day, or twenty-four hours ; yet whereas there is a difference of opinion concerning the beginning and ending of the Lord's day among the good people of this State, and this Legislature being unwilling to lay any restrictions which may seem unnecessary or unreasonable to persons of sobriety and conscience :

Innholders not to suffer drinking, idleness or play in their houses.

[Mass. Stat. Mar. 8, 1792, § 3.]

Penalty.

SECT. 4. *Be it therefore enacted*, That all the foregoing regulations, respecting the due observation of the Lord's day, shall be construed to extend to the time included between the midnight preceding and the sun setting of the same day.

Limits of the Lord's day.

[Ib. § 4.]

(c) A note made on Sunday, is not therefore void. *Geer vs. Putnam*, 10 Mass. 312.

(d) Com. vs. Maxwell, 2 Pick. 139.

CH. 9.

[*75]

No person to attend concerts or public diversion, &c. on Saturday or Sunday evening.

[Ib. § 5.]

SECT.* 5. *Be it further enacted*, That no person shall be present at any concert of music, dancing or other public diversion, nor shall any person or persons use any game, sport, play or recreation, on the land or water, on the evening next preceding or succeeding the Lord's day, on pain of three dollars and thirty-three cents for each offence; and no retailer, innholder, or person licensed to keep a public house, shall entertain, or suffer to remain, or be in their houses or yards or other places appurtenant, any person or persons, (travellers, strangers or lodgers excepted,) drinking or spending their time on the said evenings on penalty of three dollars.

Fines and penalties—how recovered.

[Mass. Stat. Mar. 11, 1797.]

SECT. 6. *Be it further enacted*, That the fines and penalties aforesaid, shall be one moiety thereof to the town (e) wherein the offence shall be committed, and the other moiety thereof to any person or persons who shall inform and sue for the same; to be recovered by a complaint to a Justice of the Peace, with costs of suit, or the said fines may be recovered by presentment of the Grand Jury before the Circuit Court of Common Pleas, in the county wherein the offence or offences shall be committed, and when thus recovered, shall enure to the town wherein the offence shall be committed. And whereas the public worship of Almighty God is esteemed by Christians an essential part of the due observance of the Lord's day, and requires the greatest decency and reverence for a due performance of the same:

[Mass. Stat. Mar. 8, 1792, § 5.]

Indecent behaviour in church, &c. how punished.

[Ib. § 7.]

SECT. 7 (f). *Be it further enacted*, That if any person shall on the Lord's day, within the walls of any house of public worship, behave rudely or indecently, he or she shall pay a fine not more than seven dollars nor less than one dollar.

Disturbing public worship, how punished.

SECT. 8 (f). *Be it further enacted*, That if any person or persons, either on the Lord's day, or at any other

(e) The Justice's interest will disqualify him from issuing a warrant in such case, if he be an inhabitant of the town to be benefitted. *Pearce vs. Atwood*, 18 Mass. 340.

(f) A charge for behaving rudely in a meeting house, and for interrupting public worship, cannot be joined in one count of an indictment. *Com. vs. Symonds, Jr.* 2 Mass. 163.

time, shall wilfully interrupt or disturb any assembly of people met for the public worship of God within the place of their assembly, or out of it, he or they shall severally pay a fine not exceeding thirty-three dollars nor less than three dollars.

CH. 9.

[Ib. § 8.]

SECT. 9. *Be it further enacted*, That no person shall serve or execute any civil process, from midnight preceding to midnight following the Lord's day : but the service thereof shall be void, and the person serving the same shall be as liable* to answer damages to the party aggrieved, as if he had done the same, without any such civil process.

Civil process not to be served on Lord's day.

[Ib. § 9.]

[*76]

SECT. 10. *Be it further enacted*, That the Tythingmen chosen, or which shall be chosen in the several towns within this State, shall be held and obliged to inquire into and inform of all offences against this act ; and all such Tythingmen as shall be hereafter chosen, shall take the following oath :—You, being chosen a Tythingman for the town of —, for the year ensuing, and until another shall be chosen in your room, do solemnly swear, that you will diligently attend to, and faithfully execute the duties of the said office, without partiality, and according to your best discretion and judgment. *So help you GOD.* And every such Tythingman is hereby authorized and empowered, to enter into any of the rooms and other parts of an inn or public house of entertainment, on the Lord's day, and the evening preceding and succeeding ; and if such entrance shall be refused to any Tythingman, the landlord or licensed person, shall forfeit the sum of seven dollars for each and every offence : And the said Tythingmen are hereby further authorized and empowered, within their respective towns, to examine all persons whom they shall have good cause, from the circumstances thereof, to suspect of unnecessarily travelling as aforesaid, on the Lord's day, and to demand of all such persons the cause thereof, together with their names and places of abode ; and if any person shall refuse to give answer, or shall give a false answer to such demand, he shall pay a fine not exceeding thirteen dollars, nor less than three dollars, and if the reason given for such travelling shall not be satisfactory to such Tythingmen, he shall enter a complaint

Tythingmen, their duty and oath.

[Ib. § 10.]

CH. 9. (e) against the person travelling, before a Justice of the Peace in the County where the offence is committed, if such person lives in such County, otherwise shall give information thereof to some Grand Jurymen, to be by him laid before the Grand Jury, for their consideration and presentment.

Oath of tythingmen competent evidence in cases.

[Ib. § 11.]

[*77]

Duty of sheriffs, grand jurors, and constables.

[Ib. § 12.]

Fines and penalties how recovered and appropriated.

[Ib. § 13.]

SECT. 11. *Be it further enacted*, That the oath of any Tythingman shall be deemed full and sufficient evidence, in any trial for any offence against this act, unless in the judgment of the Court of Justice, the same shall be invalidated by other evidence that may be produced.

SECT.* 12. *Be it further enacted*, That the special authority given by this act to Tythingmen, for preventing the breaches thereof, shall not be construed or understood to exempt any Sheriff, Grand Jurors, Constables, or other officers or persons whatsoever, from any obligation or duty, to cause this act to be put in execution, but they shall be held to take due notice and prosecute all breaches thereof, such special authority notwithstanding.

SECT. 13. *Be it further enacted*, That all the penalties and fines, incurred and paid for any of the offences aforesaid, mentioned in the seventh, eighth and tenth sections of this act shall be for the use of the State. And that all said offences, the penalties against which exceed seven dollars, shall be prosecuted by presentment of the Grand Jury, before the Circuit Court of Common Pleas, in the County wherein the offence may be committed: But all offences, the penalty whereof does not exceed seven dollars, except the offender lives out of the County in which the offence may be committed, shall be prosecuted by complaint before a Justice of the Peace in such County: But when the offender lives out of

(e) 1. The Justice is not authorized in receiving a complaint and issuing a warrant on the Lord's day, for a violation of this Statute. *Pearce vs. Atwood*, 13 Mass. 324.

2. An arrest made on the Lord's day, pursuant to a warrant so issued, is illegal, and the officer serving it will be liable as a trespasser. *ib.*

3. In an indictment for refusing to answer a tythingman &c. it is not necessary to allege that he had been sworn into office—nor that he had any wand or badge of office—nor that the defendant knew him to be a tythingman. *Com. vs. Caldwell*, 14 Mass. 333.

such County, he may be prosecuted by presentment as aforesaid, although the penalty does not exceed seven dollars (*f*).
[Approved February 5, 1821.]

Additional Act, ch. 270, Vol. 3, p. 98.

CH. 10.

Chapter 10.

AN ACT for the Punishment of Adultery, Polygamy, Lewdness and Fornication.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any man or woman shall commit adultery, and be thereof convicted (*a*), he or she shall be punished by solitary† imprisonment for a term not exceeding three months, and confinement to hard labor for a term not exceeding five years.

Punishment of adultery.
[Mass. Stat. Feb. 17, 1785, § 1.]
[†abolished; See Laws, ch. 368, § 3, Vol. 3, p. 221.]

SECT. 2. **Be** it further enacted, That if any person within this State, being married, shall marry any person, the former husband or wife being alive, or who shall continue to live so married, and being thereof convicted, shall be punished by solitary† imprisonment for a term not exceeding three months, and* by confinement to hard labour for a term not exceeding five years: *Provided always*, That this act shall not extend to any person whose husband or wife shall be continually remaining beyond sea, by the space of seven years together, or whose husband or wife shall absent him or herself, the one from the other, by the space of seven years together; the one of them in either case not knowing the other to be living within that time, nor to the wife of any married man who

Persons while married not to marry again.

[Ib. § 2.]

[†See § 1.]

[*79]
Penalty for bigamy.

Proviso in case of either party's absence.

[See ch. 440, Vol. 3, p. 283.]

(*f*) "It is impossible to imagine terms more indicative of an unequivocal exclusion of a justice's jurisdiction over a person not living within the county, than those used by the Legislature" above. *Pearce vs. Atwood*, 13 Mass. 243.

2. Offences against this statute are not originally cognizable in the S. Court. *Com. vs. Johnson*, 8 Mass. 87.

(*a*) On an indictment for adultery, the marriage of the party charged may be proved by witnesses present at the time, and a copy of the record is not requisite. *Com. vs. Norcross*, 9 Mass. 493. *Com. vs. Barbarick*, 15 Mass. 163.

CH. 10.

Or desertion
by husband for
seven years in
certain cases.

Proviso as to
the innocent
party in case
of divorce.

shall willingly absent himself from his said wife, by the space of seven years together, without making suitable provision for her support and maintenance in the mean time, if it shall be in his power so to do ; nor to any person that is or shall be at the time of such marriage divorced, by sentence of any Court whatsoever, which has, or may have legal jurisdiction for that purpose, unless such person is the guilty cause of such divorce (b), nor to any person for or by reason of any former marriage had or made, or hereafter to be had or made within the age of consent.

Punishment of
lascivious co-
habitation, and
open lewdness.

[Ib. § 6.]

[†See § 1.]

SECT. 3. *Be it further enacted*, That if any man and woman, either or both of whom being then married, shall lewdly and lasciviously associate and cohabit (c) together, or if any man or woman, married or unmarried, shall be guilty of open (d) gross lewdness and lascivious behaviour, and shall be thereof convicted before the Justices of the Supreme Judicial Court, they shall be punished by solitary† imprisonment for a term not exceeding three months, and confinement to hard labour for a term, not exceeding five years.

Punishment of
fornication.

[Mass. Stat.
Mar. 18, 1786,
§ 1.]

SECT. 4. *Be it further enacted*, That if any man shall commit fornication with any single woman, the man or woman so offending and being thereof convicted before the Circuit Court of Common Pleas, shall be punished by imprisonment in the common gaol for a term not less than ten days, nor more than sixty days : or shall be sentenced to pay a fine not less than twenty dollars, nor more than one hundred dollars, as the Court may direct. [Approved February 28, 1821.]

(b) *Com. vs. Putnam*, 1 Pick. 136; *Cambridge vs. Lexington*, *ibid*, 506.

(c) 1. An indictment under this provision is not maintained by evidence of one act of criminal intercourse between a married man and single woman. *Com. vs. Calef*, 10 Mass. 153.

2. The evidence of marriage in such case is the same as in case of adultery. See note (a) § 1, of this chapter.

(d) On an indictment for this offence, evidence of rudeness, or such behaviour, *in secret*, will not be sufficient. *Com. vs. Catlin*, 1 Mass. 8.

Chapter 11.*

CH. 11.

AN ACT against Forgery and Counterfeiting.

[*79]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall falsely make, alter, forge or counterfeit, or shall procure to be falsely made, altered, forged or counterfeited, or shall willingly aid or assist in falsely making, altering, forging or counterfeiting any public record, any certificate or attestation of a Justice of the Peace, Public Register, Notary Public, Clerk of any Court, Town Clerk, or other public officer, in any matter wherein such their certificate or attestation is receivable and may be taken as legal proof; any charter, deed, will, testament, bond or writing obligatory, letter of attorney, policy of insurance or bill of exchange; any promissory note (a), order, (b) acquittance (c) or discharge, for or upon the payment of money or delivery of goods; or any acceptance of a bill of exchange or any endorsement or assignment of a bill of exchange or promissory note, for the payment of money; any accountable receipt for money or goods, or for any note, bill or security for money or goods; or any lottery ticket in any lottery legally authorized and licensed within this State, or shall utter or publish as true, any such false, altered, forged or counterfeited record, certificate or attestation, charter, deed, will, testament, bond or writing obligatory, letter of attorney, policy of insurance,

Forgery of public records and certificates and private securities, &c.

[Mass. Stat. Mar. 15, 1903, § 1.]

or uttering them as true, &c. how punished

(a) 1. The indictment need not set forth the date of the note, nor the time when the money was made payable. *Com. vs. Ross*, 2 Mass. 373.

2. Nor an endorsement of the note. *Com. vs. Ward*, 2 Mass. 397.

(b) 1. On an indictment for altering an order in writing for money payable to the defendant, evidence of his confession that another did it, defendant knowing and assenting to it, was held sufficient to warrant a conviction. *Com. vs. Stevens*, 10 Mass. 181.

2. To constitute forgery of an order for the delivery of goods, it is not necessary that the person, whose name is forged, have goods in the hands of the drawee. *Com. vs. Fisher*, 17 Mass. 47.

(c) In an indictment for forging an acquittance, it is not necessary to allege that any goods were delivered in consideration of such acquittance; the false making, with intent to defraud, is the gist of the offence. *Com. vs. Ladd*, 15 Mass. 526.

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on conviction
in the S. J.
Court.

[†abolished;
See Laws, ch.
368, § 3, Vol.
3, p. 221.]

[*80]

Punishment
for forging
bills of cred-
it, bank bills,
&c.

[Ib. § 2.]

or aiding in
altering or ren-
dering current
as true, any
such,

or possessing
such, knowing-
ingly, with in-
tent to pass.

bill of exchange, promissory note, acceptance, endorsement, assignment, order, acquittance, discharge, accountable receipt or lottery ticket, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud any person (*d*), or any body politic or corporate, then every person so offending, in either of the particulars aforesaid, who shall be thereof duly convicted, in the Supreme Judicial Court, shall be punished by solitary† imprisonment, for a term not exceeding six months, and by confinement afterwards, to hard labour, for a term not less than two years, and not exceeding ten years.

SECT. 2. *Be it further enacted,* That if any person shall falsely make, alter, forge or counterfeit, or shall procure to be* falsely made, altered, forged or counterfeited; or shall willingly aid or assist in falsely making, altering, forging or counterfeiting, any note, certificate, or other bill of credit, which hath been or may be issued by the Treasurer or other Commissioner or Commissioners duly authorized, for any debt of this State; or any bank bill, or promissory note payable to the bearer, signed in behalf of any company or corporation, by law licensed and authorized as a bank, within this State, or payable and demandable therein, at the office of any banking company incorporated by any law of the United States; or if any person having knowledge of such false making, altering, forging or counterfeiting, shall willingly aid or assist in altering or rendering current as true, any such false altered, forged or counterfeited notes, certificates, bills of credit, bank bills, or notes, and for that purpose shall possess, at any one time, any number not less than ten (*e*) of such similar false, altered, forged or counterfeit notes, cer-

(*d*) 1. The person whose instrument is alleged to be forged is not a competent witness to prove the forgery, unless the instrument said to be forged, is produced at the trial. *Com. vs. Hutchinson*, 1 Mass. 7.

2. But when the instrument has been secreted, to screen the offender, the person whose name is charged to have been forged, and who had seen and copied the instrument, is a competent witness to prove the instrument forged, and the production of it will be dispensed with. *Com. vs. Snell*, 3 Mass. 82.

(*e*) 1. The possession in this State [Mass.] of ten counterfeit bank bills,

tificates or bills of credit, bank bills or notes, knowing the same to be false, altered, forged or counterfeit as aforesaid, with intent to utter or pass the same and thereby to injure or defraud this State, any body politic or corporate, or any person or persons, then every person, so offending, in either of the particulars aforesaid, who shall be thereof duly convicted in the Supreme Judicial Court, shall be punished by solitary† imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour, for and during his or her life. [† See § 1.]

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SECT. 3. *Be it further enacted*, That if any person shall utter (*f*), or tender in payment as true, any such false, altered, forged or counterfeit note, certificate or bill of any debt of this State, bank bill, or promissory note payable to the bearer, by any bank as aforesaid, knowing the same to be false, altered, forged or counterfeit, with intent to injure or defraud this State, any body politic or corporate, or any person or persons; every person so offending, and who shall be duly convicted thereof, in the Supreme (*g*) Judicial Court, shall be punished by solitary† imprisonment for a term not exceeding thirty days; and by confinement after- [† See § 1.]

Punishment for uttering or tendering in payment, false bills, notes, &c. knowingly.

[Ib. § 3.]

with intent to pass them in another State, is an offence within this Statute. *Com. vs. Cone*, 2 Mass. 132. *Ibid vs. Carey*, 2 Pick. 47.

2. To an indictment under this section, for possessing ten or more counterfeit bank bills, it is no sufficient objection, that it is alleged that such bills purport to be bills of such a bank—that they were payable to the bearers thereof—that they are not alleged to be *similar* bills—that they are described as promissory notes or bank bills—or that it is not alleged that the party charged had knowledge of the false making, &c. *Brown vs. Com.* 8 Mass. 59. *Com. vs. Carey*, 2 Pick. 47. *Com. vs. Whitmarsh*, 4 Pick. 233.

3. The word *similar*, in § 2, does not enter into a description of the offence, but its purpose is to distribute the provisions of the § to its respective subjects. *Brown vs. Com.* 8 Mass. 59.

4. It is necessary to describe the bills in the indictment, or to set forth a sufficient reason why they are not so described. *Com. vs. Houghton*, 8 Mass. 107. See *Com. vs. Bailey*, 1 Mass. 62; *Com. vs. Stevens*, *ib.* 203.

(*f*) Procuring a counterfeit bank note to be passed by an ignorant boy, as a true one, was held to be a passing within the provision of § 3. *Com. vs. Hill*, 11 Mass. 136.

(*g*) Or C. C. Pleas, which has jurisdiction of all offences enumerated in this chapter, except those in § 1, 2, 8. See *Laws*, ch. 233, Vol. 3, p. 63.

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Punishment on
second conviction;

or on conviction
of three
offences at
same term.

[†Sec § 1.]

wards to hard labour for a term not exceeding three years ; or by a fine not exceeding one thousand dollars, and by binding* to the good behaviour for two years, at the discretion of the Justices of the said Court before whom the conviction may be. And if after any such conviction, the same person shall be guilty a second time of the like offence, and shall be duly convicted thereof in the Supreme Judicial Court ; or if in the Supreme Judicial Court at the same term thereof any person shall be duly charged and convicted of the said offence, in three several instances, then such person may be adjudged to be a common utterer of counterfeit bills, and shall be punished by solitary† imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term not less than two years, and not exceeding ten years.

Punishment
for having, or
bringing into
the State, bank
bills, with in-
tent to pass,
&c.

[Ib. § 4.]

[†Or C. C. P.
Sec note (c)
§ 1.]
[‡Sec § 1.]

SECT. 4. *Be it further enacted*, That if any person shall bring into or shall have in his possession (*h*) within this State, any false, forged and counterfeit bill or bills, note or notes in the similitude of the bills or notes payable to the bearer thereof, issued by or for any bank or banking company, which is or shall be established within this State, or in any other part of the United States, for the purpose of rendering the same current as true, or with intent to pass the same, knowing the same to be false, forged and counterfeit, every such offender upon due conviction thereof, before the Supreme‡ Judicial Court, shall be punished by solitary‡ imprisonment, for such term, not exceeding three months ; and by confinement afterwards to hard labour, for such term not exceeding three years ; or by a fine not exceeding one thousand dollars, and imprisonment in the common gaol not exceeding one year, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

(*h*) 1. The possession of forged bills, purporting to be bills of the bank of A. no such bank in fact existing, with intent to pass them as genuine bills, is not an offence within this statute. *Com. vs. Morse*, 2 *Mass.* 138.

2. But uttering such fictitious bank-bills, with intent to injure and deceive, is a fraud at common law, punishable by indictment. *Com. vs. Boynton*, 2 *Mass.* 77.

3. *Com. vs. Smith*, 7 *Pick.* 137.

SECT. 5. *Be it further enacted*, That in all prosecutions for forgery, or counterfeiting any bank bills or promissory notes, of any of the banks mentioned and described in the second, third and fourth sections of this Act; or for uttering, publishing, or tendering in payment as true any such forged or counterfeit bills or notes, or for having the possession of any such forged or counterfeit bills or notes with intent to pass the same, the testimony of the President or Cashier of such banks may be dispensed with, if the place of residence of such President or Cashier shall exceed the distance of forty* miles from the place of trial†; but in all such cases it shall be lawful to admit the testimony of any witness acquainted with the signature of the officers of said banks, or who may have knowledge of the difference between the true and the counterfeit bills or notes of said banks, to prove that such bills or notes are counterfeit, any law or practice to the contrary notwithstanding.

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[Mass. Stat. Feb. 19, 1819.]

[†2 Pick. 47.]

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Testimony of President or Cashier may, in certain cases be dispensed with—and other proof admitted.

SECT. 6. *Be it further enacted*, That in all criminal prosecutions, within this State, for forging and altering any paper or other bill of credit of the United States of America, or either of said States; or for uttering or passing, any such paper or other bill of credit, knowing the same to be forged or altered; or of holding and possessing such forged or altered bill of credit, with intent to utter or pass the same, knowing the same to be forged or altered, the certificate under oath of the Secretary or Treasurer of the said United States of America, or of either of the said States, of the tenor of the true bill, alleged to be forged or altered, shall be admitted on trial in such prosecution, for the purpose of proving such bill of credit to be forged or altered.

[Mass. Stat. Mar. 8, 1792.]

Certificate of Secretary or Treasurer of U. States, or of any State may, in certain cases, admitted as proof.

SECT. 7. *Be it further enacted*, That if any person shall engrave, form, make or mend, or shall begin to engrave, form, make or mend any plate or plates, paper rolling press, or other tool, instrument or material, devised, adapted and designed for the stamping, forging and making any false and counterfeit certificates, bills, or notes which have been, or which shall be issued as aforesaid, by or for any debt of this State, or by or for any bank or banking company which is or shall be established in this State, or in any other part of the Uni-

Punishment for engraving or making plates, press, &c. for forging;

[Mass. Stat. Mar. 15, 1805, § 5.]

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or possessing
such plates,
&c. with in-
tent to use, &c.

[†Or C. C. P.
See note (c) §
1.]
[†See § 1.]

[*83]

ted States ; or shall have in his possession any such plate or plates, engraven in any part, or any paper rolling press, or other tool, instrument or material, devised, adapted and designed as aforesaid, with the intent (i) to use and employ the same, or to cause or permit the same to be used and employed in forging and making any such false and counterfeit certificates, bills or notes, every person so offending, who shall be thereof duly convicted before the Supreme† Judicial Court, shall be punished by solitary† imprisonment, for such term, not exceeding three months, and by confinement afterwards to hard labour for such term, not exceeding three years ; or by* fine not exceeding five hundred dollars and by imprisonment in the common gaol, for such term, not exceeding one year, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

Punishment
for forging
gold or silver
coin—or aid-
ing in passing
it as true, &c.

[Ib. § 6.]

or possessing
with intent to
pass as true,
&c.

[†See § 1.]

SECT. 8. *Be it further enacted*, That if any person shall forge or counterfeit, or shall procure to be forged or counterfeited, or shall willingly aid or assist in forging or counterfeiting any gold or silver coin, current within this State, by the laws or usages thereof, or if any person, knowing of such forging and counterfeiting, shall willingly aid or assist in passing and rendering current, as true, any such forged or counterfeit coin, and for that purpose shall, at any one time, possess any number, not less than ten, of similar (j) pieces of false money or coin, forged and counterfeited to the similitude of the gold or silver money or coin, current as aforesaid, with intent to utter the same, as true, knowing the same to be false, forged and counterfeit, every person so offending, in either of the particulars, aforesaid, who shall be duly convicted thereof in the Supreme Judicial Court, shall be punished by solitary† imprisonment for a term, not exceed-

(i) The possession of such materials without an intent to use them in counterfeiting, is not an offence within this provision. *Com. vs. Morse*, 2 *Mass.* 128.

(j) A person may be guilty of the offence described in § 8, by having in his possession ten pieces of counterfeit gold coin, or ten of counterfeit silver coin, although they be not of the same description or denomination. *Brown vs. Com.* 8 *Mass.* 59.

ing one year, and by confinement afterwards to hard labour for and during his or her life.

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SECT. 9. *Be it further enacted*, That if any person shall bring into this State, or shall possess within the same, any number of similar pieces of false money or coin, forged and counterfeited as aforesaid, knowing the same to be false, forged and counterfeit, with intent to utter and pass the same, as true; or if any person shall utter, pass or tender in payment, as true, any false money or coin, knowing the same to be false, being counterfeit, in the similitude of any gold or silver money, or coin current by law or usage, within this State, with intent to defraud any person or persons; every person, so offending, who shall be duly convicted thereof in the Supreme Judicial Court, shall be punished by solitary imprisonment for a term, not exceeding three months, and by confinement afterwards to hard labour for a term not exceeding three years; or by a fine not exceeding one thousand dollars, and by binding to the good behaviour for two years. And if after one conviction as aforesaid, the same person* shall be guilty a second time of the like offence, and shall be duly convicted thereof; or if any person before the Supreme Judicial Court, at the same term thereof, shall be charged and convicted of the said offence, in three several instances, then such person shall be adjudged to be a common utterer of counterfeit money, and shall be punished by solitary imprisonment for a term not exceeding one year, and by confinement to hard labour, for a term not less than two years, and not exceeding ten years.

Punishment for bringing into State, or possessing in it, false coin, &c. with intent to pass, &c.

[Ib. § 7.]

[† See § 1.]

Punishment on a second conviction,

[*84]

or in three several instances, at the same term.

SECT. 10. *Be it further enacted*, That if any person shall cast, stamp, engrave, form, make or mend, or shall knowingly possess any mould, pattern, dye, puncheon, engine, press or other tool or instrument, devised, adapted or designed, for the coining and making any false and counterfeit money or coin, in the similitude of the gold or silver money or coin, current within this State, by the laws or usages thereof, with the intent to use and employ the same, or to cause or permit the same to be used and employed in coining and making any such false and counterfeit money and coin as aforesaid; every person so offending, shall be punished

Punishment for making, mending or possessing any mould, or engine for coining metals, &c. or permitting such mould, &c. to be used.

[Ib. § 8.]

CH. 11. by solitary† imprisonment for such term, not exceeding three months, and by confinement afterwards to hard labour for such term, not exceeding three years ; or by a fine, not exceeding five hundred dollars, and by imprisonment in the common gaol for such term, not exceeding one year, as the Justices of the said Court, before whom the conviction may be, shall sentence and order, according to the aggravation of the offence.

[†See § 1.]

Rewards to
prosecutors, on
conviction of
certain offences.

[Ib. § 9.]

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In case of more
than one pros-
ecutor, reward
to be divided.

SECT. 11. *Be it further enacted*, That for the prevention and discovery of certain of the offences aforesaid, there shall be allowed and paid at the public treasury, by the warrant of the Governor, with the advice and consent of the Council, to be granted upon the certificate of the Justice or Justices of the Supreme Judicial Court, before whom the conviction shall be, to the person or persons, who shall inform and prosecute against any other person or persons, who shall be thereupon charged and convicted, the following rewards, that is to say ; for any conviction of the crime of forging and making any false and counterfeit certificate, bill or note, in the similitude of any certificate, bill or note, payable to the bearer* thereof, which hath been, or which shall be issued as aforesaid, for any debt of this State, or by or for any bank or banking company, within this State, by law established ; or of the crime of forging and making any false and counterfeit coin, as aforesaid, for every person that shall be so convicted, the sum of sixty dollars : and for any conviction of the crime of possessing, with an intent to utter, or of knowingly uttering any such false and counterfeit certificate, bill, note, money or coin, the sum of forty dollars, for every person that shall be so convicted. And when it shall happen that two or more are the informers and prosecutors, in any one offence, the reward, thereupon to be allowed, shall be divided between them equally, or in such other proportions, as the Justice or Justices certifying as aforesaid, shall determine and appoint. [Approved February 19, 1821.]

[Forgery at common law, may be committed of any writing, which, if genuine, would operate as the foundation of another's liability. *Ames & al. 2 Gif. 365.*]

Chapter 12.

CH. 12.

AN ACT against Perjury and Subornation of Perjury.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person, being lawfully required to depose the truth, in any proceeding in a course of justice, shall commit any manner of wilful perjury (a), every person so offending, and being thereof convicted before the Supreme Judicial Court, shall be punished by solitary† imprisonment, for a term not exceeding three months, and by confinement afterwards to hard labour, for a term not less than two years, and not exceeding fifteen years.

Punishment of perjury.

[Mass. Stat. Feb. 27, 1913, § 1.]

[†abolished; See Laws, ch. 368, § 3, Vol. 3, p. 221.]

SECT. 2. *Be it further enacted*, That if any person shall commit subornation of perjury, by procuring another person to commit wilful and corrupt perjury as aforesaid, every person guilty of such subornation of perjury, and being thereof duly convicted, shall be liable to, and suffer the same punishment and disability, as in this act is provided for the punishment of wilful perjury.

Of subornation of perjury.

[Ib. § 2.]

SECT. 3. *Be it further enacted*, That if any person shall wilfully and corruptly endeavour to incite or to procure another* person to commit wilful and corrupt perjury, as aforesaid, and the person, so incited, do not commit such perjury, the person so corruptly endeavouring to incite, and procure the committing of perjury, shall be punished by solitary† imprisonment, for a term not exceeding two months, and by confinement afterwards to hard labour, for a term not exceeding five years.

Of a corrupt endeavour to procure the commission of the crime of perjury.

[*86]

[Ib. § 3.]

[†See § 1.]

SECT. 4. *Be it further enacted*, That the oath of any person offending in any manner aforesaid, and thereof duly convicted as aforesaid, shall not be received, in any Court

Persons convicted not to be received as witnesses, until, &c.

(a) 1. In an indictment for perjury, it is not necessary to allege that the witness was summoned to appear at the court, or that the false affirmation was in answer to a specific question. *Com. vs. Knight*, 12 Mass. 274.

[Ib. § 4.]

2. It is sufficient to allege that the perjury was committed in the trial of an issue duly joined, without an express allegation that the cause of action was within the jurisdiction of the court. *Ib.*

3. But it should appear in the indictment that the facts testified were material. *Ib.*

CH. 13. of record, until such time as the judgment given against such person shall be reversed. [Approved February 27, 1821.]

Chapter 13.

AN ACT for the Suppression and Punishment of Cheats.

Cheating by
false pretences.

[Mass. Stat.
Feb. 16, 1816,
§ 1.]

Punishable in
Supreme Jud.
Court.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That all persons, who knowingly and designedly, by false pretence (a) or pretences, shall obtain from any person or persons, money, goods, wares, merchandize or other things, with intent to cheat, or defraud any person or persons of the same, shall, on conviction thereof, before the Justices of the Supreme Judicial Court, be sentenced to pay a fine to the use of the State, not less than forty dollars, and not exceeding four hundred dollars ; or be sentenced to be confined to hard labour, for a term not exceeding seven years, at the discretion of the Court before whom such conviction shall be had.

Supreme Jud.
Court to have
jurisdiction of
gross frauds at
common law.

[Ib. § 2.]

SECT. 2. *Be it further enacted*, That the Supreme (b) Judicial Court shall have exclusive jurisdiction of all gross frauds or cheats at common law ; and any person who shall, before said Court, be convicted of any such fraud or cheat, shall be sentenced by the said Court to receive such punishment as is provided in and by the first section of this Act. [Approved February 14, 1821.]

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Chapter 14.*

AN ACT respecting the wilful destruction and casting away of Ships, and Cargoes ; the custody of Shipwrecked Goods, and Trade and Navigation.

Punishment
for wilfully de-

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any owner

(a) Com. vs. Warren, 6 Mass. 72.

(b) C. C. Pleas have now concurrent jurisdiction with the S. J. Court, of the offences enumerated in this Statute. See ch. 233, Vol. 3, p. 62.

of, captain, master, officer or other mariner belonging to, any ship or vessel, shall, within the body of any County of this State, wilfully cast away, burn, sink, or otherwise destroy, the ship or vessel of which he is owner, or to which he belong, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons, that hath underwritten, or shall underwrite any policy or policies of insurance thereon, or, of any merchant or merchants, that shall load goods thereon; or of any owner or owners of such ship or vessel; every person so offending, being thereof lawfully convicted, before the Supreme Judicial Court of this State, shall be deemed and adjudged a felon, and shall be sentenced to imprisonment for life, or for a term not less than five years, at the discretion of the Court: *Provided nevertheless*, That nothing herein contained shall be construed to bar or prevent the party injured from having and maintaining his action for the damages, sustained thereby.

CH. 14.

destroying a vessel, or causing it to be done.

[Mass. Stat. Mar. 8, 1808, § 1.]

Party injured may also have his action for damages.

SECT. 2. *Be it further enacted*, That if any owner of any ship or vessel shall equip, or fit out such ship, or vessel, within this State, with intent that the same should be wilfully cast away, burnt, or otherwise destroyed, to the prejudice of any owner of any goods, laden on board said ship or vessel, or of any underwriter upon any policy, or policies of insurance upon such ship or vessel, or upon any goods laden thereon, and shall be thereof convicted before the Supreme Judicial Court of this State, such offender shall be sentenced to pay a fine not exceeding five thousand dollars, or be punished by solitary† imprisonment for a term, not exceeding three months, and confinement to hard labour for a term, not exceeding five years.

Punishment for fitting out a vessel, with intent to be wilfully cast away.

[Ib. § 2.]

[†abolished; See Laws, ch. 368, § 3, Vol. 3, p. 221.]

SECT. 3. *Be it further enacted*, That if any owner of any ship or vessel, or of any goods laden on board such ship or* vessel, shall make out and exhibit, or cause to be made and exhibited any false or fraudulent bills of parcels, invoices, or estimates of any such goods, laden or pretended to be laden on board such ship or vessel, with intent to defraud any underwriter upon any policy or policies of insurance upon such ship or vessel, or upon any goods laden

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Punishment for making out false invoice, &c. of cargoes, to defraud underwriters.

[Ib. § 3.]

CH. 14. thereon ; every person, so offending, and being thereof lawfully convicted, shall be sentenced to pay a fine not exceeding five thousand dollars, or be punished by solitary† imprisonment, for a term not exceeding three months, and confinement to hard labour, for a term not exceeding five years.

[†See § 2.]

Punishment
for making
any false affi-
davit or pro-
test.

[lb. § 4.]

SECT. 4. *Be it further enacted,* That if any captain, mate or mariner of any ship or vessel, shall make out and swear to any false affidavit, or protest ; or if any owner of any such ship or vessel, or of any goods laden thereon, shall procure such false affidavit, or protest, or, knowing the same to be false, shall exhibit the same, with intent to deceive and defraud any underwriter upon any policy of insurance upon any such ship or vessel, or any goods laden thereon, every person convicted thereof before the Supreme Judicial Court aforesaid, shall be punished in the manner prescribed in the third section of this Act.

Commission-
ers of wrecks.

[Mass. Stat.
Mar. 2, 1815,
§ 3.]

To be sworn.

To give bond
to Judge of
Probate ;

same remedy
thereon, as on
administration
bond.

SECT. 5. *Be it further enacted,* That the Governor, with the advice of Council, be, and he is hereby authorized to appoint, in the several counties of this State, a sufficient number of COMMISSIONERS, removeable at the pleasure of the executive, OF WRECKS, and LOST GOODS, all of whom shall be commissioned and sworn to the faithful performance of their duty, and shall give bond to the Judge of Probate for the county in which they reside, with sufficient sureties to the acceptance of said Judge, for the faithful discharge of their trust. And the same remedy may be had, on said bonds, to any owner, agent, or other person interested in said property, as is had on bonds, given to Judges of Probate, for the faithful administration on estates.

Commissioners
to take charge
of wrecked
goods,

[lb. § 1.]

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SECT. 6. *Be it further enacted,* That any Commissioner, appointed in pursuance of this act, immediately on receiving information of any shipwreck, finding of any goods or shipwrecked property of any kind, to the amount of one hundred dollars, or upwards, on any of the shores, or waters, within* this State, shall immediately repair to said property, and in case the same is unattended by any owner, or agent, shall take charge of the same for the lawful owner ; and in the best way and manner, in his power, preserve and secure the same ; and said Commissioner shall have all the power

and authority of a fireward to preserve and secure the same, and compel assistance for that purpose ; and it shall be the duty of said Commissioner to take an inventory of the same, and when required by the owner, or agent of said property, or any insurance company, or underwriter, or other person interested in said property, shall make oath that the same is the whole property which has come to his custody, and shall immediately deliver the same to the lawful owner, agent, or other person legally authorized to receive it: *Provided*, he is paid or secured to be paid, such reasonable compensation for his services and expenses, and such custom house duties, as may be due from said property, or which may have been previously paid by said Commissioner ; and said Commissioner and the owner, or agent, shall have power to agree on the proper compensation to be allowed for said services and expenses : but in case they shall not agree, said Commissioner shall receive such sum, as shall be awarded by referees, mutually chosen by the parties ; said Commissioner to choose one referee, the owner, agent, or other person interested, another, and the two thus chosen, shall choose a third ; and the referees thus appointed, and the parties thus appointing them, shall proceed in all respects as is required by "An Act for rendering the decision of civil causes as speedy and as little expensive as possible ;" and if either party shall be dissatisfied with the award of the referees aforesaid, notice shall be given to the opposite party and an appeal shall lie to the Supreme Judicial Court, next to be holden in and for the county, in which such property shall be found ; and the Supreme Judicial Court shall have power to hear and determine the case, in the same manner, as if the cause came before them on an appeal from the Circuit Court of Common Pleas ; and no owner or agent, or other person interested in said property, shall be holden to pay any charge to any other person for services or expenses, in taking or securing said property, than the* Commissioner aforesaid, unless it be that property taken and secured before the arrival of said Commissioner ; in which case said Commissioner shall, upon due hearing of all parties interested determine the compensation to be received as aforesaid, and from his award in writing there shall

CH. 14.

and take inventory, and make oath thereto, when required by owner ;


and deliver the same to owner, on payment for services, &c.

Compensation to be settled by referees, if not agreed on by parties.

[†See ch. 78, this Vol.]

Appeal from decision of referees to S. J. Court.

[*90]

CH. 14.  be no appeal, unless the sum demanded and allowed by said Commissioner shall exceed the sum of fifty dollars ; in which case an appeal shall lie to the Supreme Judicial Court, to either party aggrieved by the doings of said Commissioner ; and similar process shall be had by said Court as is had in cases carried by appeal from the Circuit Court of Common Pleas : and in case any person or persons shall, after the arrival of the Commissioner aforesaid, intermeddle with, take, secrete, or detain any property shipwrecked or found as aforesaid, but as he or they are authorized and directed by the Commissioner, owner, or agent, or other person interested, he or they shall forfeit and pay the sum of one thousand dollars, for each and every offence, to be recovered by an action of debt in any Court proper to try the same ; and the said Commissioner, owner, agent, or other person interested, or either of them, are hereby authorized to bring said action and receive said penalty to their own use.

Penalty for secreting shipwrecked property, or intermeddling with it after the arrival of a Commissioner.

Commissioners on their arrival at any wreck to publish an account of facts ;

[Ib. § 2.]

penalty for neglect.

Commissioners may sell sufficient of the property at auction to pay duties.

[*91]

and in certain cases may sell the whole property.

SECT. 7. *Be it further enacted,* That it shall be the duty of the Commissioners aforesaid, immediately on their arrival at any wreck or goods found as aforesaid, to publish in the most expeditious manner, the facts they shall ascertain, that the knowledge of the event may come to the owner, agent, or person interested, as soon as may be ; and in all cases they shall publish the particulars of said shipwreck, or goods found, in the nearest newspaper to said shipwreck or goods found, on penalty of fifty dollars, to be recovered by an action of debt, in any Court, proper to try the same, at the suit of the owner, agent, or other person interested, who are hereby authorized to bring said action and receive the penalty recovered, to their own use ; and it shall and may be lawful for said Commissioners to dispose of so much of said property, at public auction, within thirty days from taking the same into custody, as shall be sufficient to pay all duties, due for the same, to the Custom House, and shall forthwith pay, or give security to the Custom House officer, for* the discharge of the same ; and in case the property so taken as aforesaid is perishable, and cannot be retained in possession for one year, without essentially lessening its value, and no owner, agent, or other person, interested in the

same, shall appear to claim it, for the space of sixty days, CH. 14.
 it shall be the duty of said Commissioners to advertise said

property in the public newspapers, and sell the same at auction to the best advantage, and if no owner, agent or other person, interested in said property, shall appear, in one year to claim said property, it shall be the duty of each of said Commissioners to present an inventory of said property, received by him as aforesaid, or if sold, an account of sales to the Treasurer of this State, and to make oath, that the same is the whole property which has come to his possession, duties paid to the Custom House excepted, if said duties are paid; and shall pay over to the Treasurer aforesaid the whole balance remaining in his hands for the use of the State: and the Treasurer aforesaid is hereby authorized to make said Commissioner such reasonable compensation for his services and expenses, as shall be just and equitable, to be ascertained in case of disagreement by said Commissioners and Treasurer, in the same way and manner, as is provided for in this act, when said Commissioners and owners, or agents, shall not agree respecting such services and expenses; and when any Commissioner, appointed in pursuance of this Act, shall neglect to inform the Treasurer of this State, of property, taken by him as aforesaid, for sixty days, after the expiration of the year, he may have held the same; or if so informing said Treasurer, he or they shall neglect to pay over the property aforesaid, to the Treasurer aforesaid, the Attorney General of this State is hereby authorized and directed to commence a proper legal process for the same, at the next term of the Supreme Judicial Court in the County where said Commissioner dwells, and shall pursue the same to final Judgment and execution, and pay the sums, recovered as aforesaid, to the Treasurer of said State: and whereas† it is of the greatest consequence to this State, and to the United States, to promote the increase of* the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein: and whereas it has been held that owners of ships or vessels, are answerable for goods, wares, and merchandize, shipped on board the same, although the

If no owner appear within one year, the Commissioner to present an inventory, or account of sales, to State Treasurer on oath.

Commissioner to receive reasonable compensation from Treasurer.

Attorney General to prosecute Commissioner for delinquency.

[†Mass. Stat. Feb. 20, 1819, Preamble.]

[*92]

CH. 14. said goods, wares, and merchandize should be embezzled, lost or destroyed, by the masters or mariners of said ships and vessels, without the knowledge or privity of the owner or owners ; by means whereof merchants and others may be discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this State ; Therefore,

Extent to which owners of vessels are liable for embezzlement by master or mariners.

[Ib. § 1.]

SECT. 8. *Be it further enacted,* That no person or persons who is, are, or shall be owner or owners, in part or in whole, of any ship or vessel shall be subject, or liable to answer for, or make good to any one or more person, or persons, any loss or damage, by reason of any embezzlement, secreting or making way with, by the master or mariners, or any of them, of any goods, wares, or merchandize, or any property whatsoever, which shall be shipped, taken in, or put on board any ship or vessel, or for any act, matter, or thing, damage, or forfeiture done, occasioned, or incurred by the said master or mariners, or any of them, without the privity or knowledge of such owner or owners, further than the value of the interest which such owner, or owners have, or had, at the time of such shipment in the ship or vessel, with all her appurtenances, and the full amount of his interest in the freight due, or to grow due, for and during the voyage wherein such embezzlement, secreting, or making way with, as aforesaid, or other malversation of the master or mariners, shall be made, committed, or done, any law, usage or custom to the contrary notwithstanding (a).

(a) 1. The owner of a vessel under charter, the hirer having the whole control of it for the time, to victual and man her and pay over a portion of the net proceeds to the owner for the use of the vessel, is not liable to the shippers of goods on board which have been embezzled or otherwise not accounted for by the master. *Reynolds vs. Toppan*, 15 *Mass.* 370. *Cutter & al. vs. Winsor*, 6 *Pick.* 333.

2. And when the hiring of the vessel was by parol, upon similar conditions, the hirer was so far considered as owner, that he could not be charged with barratry. *Taggard & als. vs. Loring*, 16 *Mass.* 336.

3. To constitute barratry, it is necessary that the act complained of should be either criminal or fraudulent on the part of the master ; and a deviation or delay, although there may be a violation of duty, will not amount to barratry, without a fraudulent or criminal purpose at the time. *Wiggin & al. vs. Amory*, 14 *Mass.* 1.

SECT. 9. *Be it further enacted*, That if several freighters or proprietors of any such goods, wares, or merchandize, or any property whatever, shall suffer loss or damage, by any of the means aforesaid, in the same voyage, and the value of the ship or vessel and all her appurtenances, and the amount of the freight due, or to grow due, during such voyage, shall not be sufficient to make compensation to all and every of them, then such freighter, or proprietor shall receive satisfaction* thereout in average, in proportion to their respective losses and damages: and in every such case, it shall, and may be lawful to and for such freighters, or proprietors, or any of them, in behalf of himself and all other such freighters and proprietors, or to, or for the owners of such ship or vessel, in behalf of himself and all the other part owners of such ship, or vessel, to exhibit a bill in the Supreme Judicial Court for a discovery of the total amount of such losses and damages, and also of the value of such ship or vessel, appurtenances and freight, and for an equal distribution and payment thereof, amongst such freighters and proprietors in proportion to their losses and damages, according to the rules of equity; and the said Supreme Judicial Court is hereby vested with full power and authority to entertain, hear, determine, and decree, in such cases, in the same manner as Courts of equity would have authority to do.

CH. 14.

Where vessel, cargo and freight are insufficient to make compensation, in case of several freighters, or proprietors, what proceedings are to be had.

[*93]

[Ib. § 2.]

Bill for discovery may be filed in Sup. Jud. Court.

SECT. 10. *Be it further enacted*, That the charterer of any vessel (in case he shall navigate such vessel at his own expense) shall be considered the owner; within the meaning of this act; and, in case any loss or damage shall happen to any person or persons, by any of the causes or circumstances, mentioned in the eighth section of this act, and such loss or damage shall be compensated from the freight, or the proceeds of the sale of such vessel, or both, in manner as herein before provided; then the owner or owners of such vessel or vessels shall have a right to recover the value of such vessel or vessels, of the person, or persons, to whom

Charterer to be considered as owner in case.

[Ib. § 3.]

4. If the master, without instructions from the owners of the vessel, enter a foreign port and there sell the ship and cargo, it will be barratry; for which the insurers on the cargo will be liable to the insured, they not being the owners of the vessel. *Taggard & al. vs. Loring*, 16 Mass. 336.

- CH. 15. such vessel or vessels shall have been chartered, as aforesaid.
 [Approved February 27, 1821.]

Chapter 15.

AN ACT to protect the Sepulchres of the Dead.

Punishment
for digging up
or removing
dead bodies;
[Mass. Stat.
Mar. 2, 1815,
§ 1.]
[*94]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person, not being authorized by the Board of health, or the Selectmen of any (a) town in this State, shall knowingly and wilfully dig up, remove or carry away, or aid or assist in digging up, removing* or carrying away any human body, or the remains thereof, such person or persons, so offending, shall, on conviction of such offence, in the Supreme† Judicial Court of this State, be imprisoned not more than one year, or fined, not more than one thousand dollars, according to the nature and aggravation of the offence.

for concealing
such body.
[Ib. § 2.]

SECT. 2. *Be it further enacted*, That if any person, or persons knowingly and wilfully receive, conceal (b), or dispose of any human body, or the remains thereof, which shall have been dug up, removed, or carried away in the manner described in the first section of this act, he or they shall be subject to the same forfeitures and penalties, as in said section is provided, on conviction thereof in the Court aforesaid: *Provided however*, That nothing in this act shall be so construed as to affect the power or authority in the Courts of the United States, or of this State, or of any person acting under the authority of the same, in removing or disposing of the bodies of persons executed pursuant to any sentence of such Court.

Proviso.
[Ib. § 3.]

SECT. 3. *Be it further enacted*, That all fines, accruing

(a) An averment, in an indictment under § 1, that the defendant was not authorized by the selectmen of the town where the body had been buried, was held sufficient. *Com. vs. Loring*, 8 Pick. 370.

(b) An indictment under § 2, was sustained, when the evidence, though it had a tendency to prove an offence under § 1, did not conclusively prove such offence. *Com. vs. Loring*, 8 Pick. 370.

under this Act, shall enure, one half to the informer, and one half to the town in which the offence is committed. [Approved February 14, 1821.]

CH. 16.

Fines, how appropriated.

Chapter 16.

AN ACT to prevent the arrest of Dead Bodies.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That if any Sheriff, Coroner or Constable, shall take the body of any deceased person, by virtue of any writ, on mesne process or execution, upon conviction of such offence, before the Supreme Judicial Court, or the Circuit Court of Common Pleas, within the County, in which such offence shall have been committed, he shall be fined not more than five hundred dollars, or imprisoned for a time not exceeding six months. [Approved March 10, 1821.]

Punishment for taking dead bodies on mesne process or execution.

[Mass. Stat. Feb. 12, 1812, § 2.]

Chapter 17.*

[*95]

AN ACT to prevent Routs, Riots, and Tumultuous Assemblies, and to suppress Insurrections.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any number of persons of twelve or more shall be unlawfully, riotously, or tumultuously assembled, and shall not immediately disperse themselves, after having been by any Sheriff, Deputy Sheriff or Justice of the Peace of any County, or any Constable of any Town, commanded so to do, in the name of this State, each and every person of such assembly shall be punished by solitary† imprisonment, not exceeding one year, and afterwards be confined to hard labour for a term, not exceeding one year, or fined in a sum, not exceeding five hundred

Riots, and unlawful assemblies,

[Mass. Stat. Oct. 23, 1786, § 1.]

to disperse when commanded by a Justice,

[†abolished—see ch. 363, vol 3, p. 221.]

Punishment for disobedience.

CH. 18. dollars, to the use of this State; any or all of the above punishments, according to the aggravation of the offence (a).

[Mass. Stat.
Mar. 6, 1810,
§ 2.]

[†See ch. 340,
vol. 3, p. 186.]

Punishment
for being dis-
guised to ob-
struct the exe-
cution of laws,
&c.

In case of In-
surrection
Governor may
call out the mi-
litia.

[Mass. Stat.
Feb. 20, 1787,
§ 1.]

SECT. 2. *Be it further enacted*, That if any person or persons shall disguise himself or themselves, with intention to obstruct the execution of the laws of this State, or to intimidate or interrupt any Sheriff, Deputy Sheriff, Surveyor† or other person, in the legal discharge of any office or appointment, under the laws of this State, every such person so disguised shall, on conviction, be fined in a sum, not exceeding five hundred dollars, or be imprisoned, not exceeding one year, or both, according to the aggravation of the offence.

SECT. 3. *Be it further enacted*, That whenever an insurrection shall have taken place, in this State, to obstruct the course of Justice, or the due execution of the laws, the Governor of this State is hereby empowered to detach, and call into actual service, such part of the Militia of the State, as, in his opinion, shall be adequate to suppress the same.

[Approved March 5, 1821.]

[*96]

Chapter 18.*

AN ACT to prevent Gaming for Money or other Property.

All securities
won by gam-
ing declared
void.

[Mass. Stat.
Mar. 4, 1786,
§ 1.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That all notes, bills, bonds, judgments, mortgages, or other securities or conveyances, given, granted, drawn, entered into, or executed by any person or persons whatsoever, where the whole, or any part of the consideration of such conveyances or securities, shall be for any money, or other valuable thing, won by gaming or playing at cards, dice or any other game or games,

(a) 1. If numbers assembled disturb others in the enjoyment of a lawful right, it is a riot. *Com. vs. Runnel and als.*, 10 Mass. 518.

2. In an indictment for a riot it is sufficient to allege, that the defendants assembled with *force and arms*, and being so assembled did &c. without repeating the force and arms. *Ib.*

3. If the doing of an unlawful act be charged, it need not be alleged to have been in *terrorem populi*. *Ib.*

CH. 18.

or by betting on the side or hands of any person gaming, or for the reimbursing or repaying any money, knowingly lent or advanced, for any gaming or betting, or lent and advanced at the time and place of such play, to any person or persons, so gaming or betting, or that shall, during such play, so play or bet, shall be void and of no effect; and that where such mortgages, securities or other conveyances, shall be of lands, tenements or hereditaments, or shall be such as incumber or affect the same, such mortgages, securities or other conveyance shall enure, and be to the sole use and benefit of such person or persons, as should or might have, or be entitled to such lands, tenements or hereditaments in case the said grantor or grantors thereof, or the person or persons so incumbering the same, had been naturally dead; and that all grants or conveyances to be made for the preventing of such lands, tenements or hereditaments from coming to, or devolving upon such person or persons, hereby intended to enjoy the same, as aforesaid, shall be deemed fraudulent, void, and of no effect.

Conveyance of real estate given as above shall enure to the same uses as if the grantor were dead.

SECT. 2. *Be it further enacted*, That any person or persons, who shall at any time, or sitting, by playing at cards, dice, or any other game or games, or by betting on the sides or hands of such as do game, lose to any one or more person or persons so playing or betting, any sum or sums of money, or any other valuable thing, and shall pay or deliver the same, or any part thereof, the person or persons, so losing and paying, or delivering the same, shall be at liberty to sue for and recover the money or goods, so lost and paid or* delivered, or any part thereof, or damages to the full value of the same, from the respective winner or winners thereof, with costs of suit, by action to be commenced within three months next after the losing, paying or delivering the same, in which it shall be sufficient for the plaintiff to allege, in an action of *assumpsit*, that the defendant had received, to the plaintiff's use, the money so lost and paid; and in an action of *trover* for the goods so lost and delivered, that they came to the hands of the defendant, without mentioning in the declaration the particular manner and occasion of the goods or monies being lost; and in case the per-

Persons losing money, &c. by gaming may recover the same of persons winning.

[Ib. § 2.]

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CH. 18.

If the person losing shall not within three months, sue for the same, any person may recover treble the value.

son or persons, who shall lose such money or other thing as aforesaid, shall not, within the time aforesaid, really and truly without covin or collusion, sue, and with effect prosecute, for the money or other thing, so by him or them lost and paid or delivered, as aforesaid, it shall and may be lawful to and for any person or persons to sue for and recover treble the value of the money, goods or chattels, with full costs of suit, by action of debt upon this statute, against such winner or winners as aforesaid, one moiety thereof to the use of the person or persons, that will sue for the same, and the other moiety to the use of the poor of the town where the offence shall be committed.

Persons winning at one sitting three dollars or more and receiving the same, or security for it, shall forfeit double the amount.

[1b. § 3.]

SECT. 3. *Be it further enacted*, That any person who shall be convicted, on an indictment of the Grand Jury, before the Circuit Court of Common Pleas, or the Supreme Judicial Court, of winning, at any one time or sitting, of any person or persons, by gaming or betting as aforesaid, in money, goods or chattels to the value of three dollars or upwards, and of receiving the same or security therefor, shall forfeit double the amount or value of the money, goods or chattels, so won and received, to the poor of the town, where the offence is committed.

Suits against persons winning how to be conducted.

[1b. § 4.]

SECT. 4. *Be it further enacted*, That in suits brought by the person losing money, goods or chattels against the person winning the same, when it shall appear from the declaration, that the goods, said to be lost, came to the hands of the defendant by gaming ; or the money he had received was by gaming, then and in such case, if the plaintiff shall offer to make oath, and if required by the Court, where the trial is,* shall actually swear to the losing the money, goods or chattels, by gaming with the defendant, at the time and place alleged, judgment shall be rendered for the plaintiff to recover damage, to the amount of the goods or money the defendant has received of the plaintiff, by gaming, with costs of suit, unless the defendant will swear that he did not receive of the plaintiff the money, goods or chattels for which he is sued, or any part of them by gaming ; and when the defendant discharges himself on oath as aforesaid, he shall recover of the plaintiff his reasonable costs : *Provided never-*

[*98]

theless, That nothing in this act shall be so construed, as to prevent the supporting and proving any declarations, on the aforesaid actions, in the same manner as other declarations are proved, but it shall be considered as optional with the plaintiff either to proceed in proving his declaration, in the way specially provided in this act, or in the same way other declarations are proved ; any thing herein to the contrary notwithstanding.

CH. 19.

Proviso.

SECT. 5. *Be it further enacted*, That if any person shall play at cards, dice or billiards, or with any other implements used in gaming, in any tavern or house of entertainment, or place licensed for retailing spirituous liquors, or in any of the out houses, yards, gardens, or appendages of the same, or shall in any of the houses, or licensed places aforesaid, expose to view any of the implements aforesaid, or shall be seen sitting at any table therein, with any of the said implements before him, and shall be convicted thereof before any Justice of the Peace, or any Circuit Court of Common Pleas, on the presentment of a Grand Jury, the person so offending shall forfeit and pay a sum, not less than one, nor more than ten dollars, to the use of the poor of the town where the offence shall be committed. [Approved February 27, 1821.]

Penalty for playing at cards, &c, at any house of entertainment.

[Ib. § 5.]

Chapter 19.

AN ACT for the restraining the taking of excessive Usury.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That no person (a) or persons* upon any contract hereafter made, shall take, directly or indirectly (b), for loan of any monies, wares, merchan-


No person to take more than six per cent. interest.

[*99]

(a) Banking corporations are within the provisions of this Statute. *Maine Bank vs. Butts*, 9 Mass. 49.

(b) 1. A note may be sold at a greater discount than the legal interest, without being usurious. *Churchill vs. Suter*, 4 Mass. 162.

2. But if a note be thus sold, and the purchaser take the guaranty of all persons who ever had any interest in the note, such sale will bring the

CH. 19.  dize or any other commodities above the value of six dollars, for the forbearance of one hundred dollars for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time (c); and that all bonds, contracts, mortgages (d)

[Mass. Stat.
Mar. 16, 1794,
§ 1.]

note within the Statute against usury. *Id.* See *Knights vs. Putnam*, 3 Pick. 171.

3. Where for a debt of \$130, on which usurious interest had been paid, the debtor gave a promissory note for \$100, and another for \$39 payable in thirty days; both notes were held usurious. *Jones vs. Whitney*, 11 Mass. 74; *Maine Bank vs. Butts*, 9 Mass. 49.

4. Where by the terms of a contract the party may, by payment at a certain day, avoid any stipulated penalty, such contract is not usurious. *Cutler vs. How*, 8 Mass. 257; *Cutler vs. Johnson*, *ib.* 266.

5. But where A. was owing B. a sum of money and gave his note payable in six months in Indian corn, at a much lower rate than its current value; the note being only in part paid when it fell due, was put in suit by B., who afterwards adjusted the suit and took a new note for the balance of the former, estimated upon the current value of the corn, payable in seven months in oats, at a much lower rate than their current value; this last note was held to be usurious and void. *Cutler vs. Johnson*, 8 Mass. 266.

6. Where A. owed B. a sum of money for a valid consideration, and B. owed C. a sum on which he had received usurious interest, and by agreement of the parties, A. gave C. a note for the amount due from B. to C. including the usurious interest, and received of B. a discharge for so much of the sum due B. from A.; it was held that the note so given to C. was not void under this statute, the verdict of the jury having negatived any contrivance to evade the statute. *Bearce vs. Barstow*, 9 Mass. 45.

7. Where the promise to pay extra interest on a note was verbal, the note was held not to be affected thereby. *Butterfield vs. Kidder*, 8 Pick. 512.

(c) 1. Upon a note payable in a certain number of years, with interest annually, judgment can be recovered only for simple interest on the principal sum. *Hastings vs. Wiswall*, 8 Mass. 455; *Doe vs. Warren & al.* 7 Glf. 48.

2. In casting interest where partial payments have been made and endorsed, on bonds, notes or other securities for money, it is correct to calculate the interest from the date of the security, or the time when the interest is to commence, to the time of the first payment endorsed; to add this to the principal, and from the sum to subtract the payment. On this remainder to cast interest to the time of the second endorsement, which is added to the remainder, and from this sum to subtract the second endorsement. And thus to the time of judgment. But when the interest exceeds the payment, this method is not lawful. In such case, the rule is to compute the interest on the principal sum, to the time when a payment was made, which exceeds, either alone or in conjunction with the preceding payments, if any, the interest at

and assurances made for the payment of any money lent, or covenanted to be lent, upon or for usury, whereupon or whereby there shall be reserved or taken above the rate of six dollars in the hundred as aforesaid, shall be utterly void (d); and that any person or persons, who shall upon any con-

CH. 19.

Usurious
bonds, mort-
gages, &c. to
be void.

the time due; add that interest to the principal, and from the sum subtract the payment made at that time, together with the preceding payments, if any; and the remainder forms a new principal, on which compute and subtract the interest, as upon the first principal. *Dean vs. Williams*, 17 Mass. 417.

(d) 1. This means only voidable. *Smith vs. Saxton*, 6 Pick. 487.

2. Where the title to real estate is absolutely vested by deed of bargain and sale, it shall not be disturbed by proof that all, or part of the consideration was a usurious debt. *Flint vs. Sheldon*, 13 Mass. 445; *Hale vs. Jewell et al.* 7 Glf. 435. See *Wheaton vs. Tisdale*, 9 Mass. 328.

3. Where usurious interest has been taken on a loan of money, the mortgage or contract is not void, unless the usurious interest was originally reserved thereon; though the party may be liable to indictment on an action for the forfeiture given by this statute. *Gardner vs. Flagg*, 8 Mass. 101; *Frye vs. Barker & al.* 1 Pick. 267.

4. But otherwise, if legal interest be reserved in the contract, and extra interest is paid at the time of making. *Thompson vs. Woodbridge*, 8 Mass. 256; *Chadbourn vs. Watts*, 10 Mass. 121.

5. The mere taking of usury upon a contract which, when made, was free from any corrupt agreement, will not avoid the contract, when proved, upon an issue to the country. *Aliter*, when proved by the party's own oath, under the provisions of the statute § 2. *Frye vs. Barker & al.* 1 Pick. 268.


6. A mortgage made upon a usurious consideration, is void only against the mortgagee, and those who may lawfully hold the estate under him; a purchaser of the mere equity of redemption cannot avoid the mortgage by plea or proof of usury. *Green vs. Kemp*, 13 Mass. 515.

7. But in a real action a purchaser may avoid a prior conveyance from his grantor, by giving usury in evidence under the general issue of *nul dis- seizen*. *Hills vs. Eliot*, 12 Mass. 30.

8. Where judgment has been rendered upon a usurious contract, it cannot afterwards be avoided for the usury. *Bearce vs. Barstow*, 9 Mass. 48; *Thatcher & al. vs. Gammon*, 12 Mass. 269.

9. Nor can a new security given in payment of such judgment. *Bearce vs. Barstow*.

10. If a security given for a subsisting simple contract be void as usurious, the original debt remains good. *Johnson vs. Johnson*, 11 Mass. 359; *Stebbins vs. Smith*, 4 Pick. 97.

CH. 19.  tract, take, accept and receive, by way and means of any corrupt bargain, loan or exchange, or by covin or deceitful conveyance, or by any other ways or means, for the forbearing or giving day of payment for one whole year, of and for their money, or other thing or things above the sum of six dollars for the forbearing of one hundred dollars for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, shall forfeit and lose for every such offence the full value of the goods and monies, or thing or things so lent, exchanged, bargained, sold, or agreed for, to be recovered by indictment† or action of the case, one moiety thereof to the use of this State, and the other moiety to him or them, who (e) prosecutes for the same, any law to the contrary notwithstanding.

Penalty and mode of recovery.

[† *Com. vs. Harrington*, 3 Pick. 26.]

11. If an innocent indorsee of a note, in which usurious interest is reserved, take a new note of the maker for the amount due on the former note, such note cannot be avoided as usurious. *Chadbourn vs. Watts*, 10 Mass. 121.

12. Yet a note given upon a usurious contract is void, even in the hands of an innocent and *bona fide* holder. *Bridge & al. vs. Hubbard*, 15 Mass. 96.

(e) 1. To entitle one to the moiety, it must appear in the record that he prosecuted, complained or sued for it. *Com. vs. Frost*, 5 Mass. 53.

2. The borrower is a competent witness, on an indictment against the lender. *Ib.*

3. If the lender acts as agent, it will be no excuse for him, especially if his agency be not disclosed at the time of negotiating. *Ib.*

4. The offence is completed if more than six per cent. interest be paid at the time of the loan, whether the principal be ever repaid or not. *Ib.*

5. But if the usurious interest be only secured, the penalty is not incurred. *Thomes vs. Cleaves*, 7 Mass. 361; *Chadbourn vs. Watts*, 10 Mass. 121. See *Gardner vs. Flagg*, 8 Mass. 101; *Frye vs. Barker & al.* 1 Pick. 268.

6. But, where A. conveyed land to B. of the value of \$1600 for \$350, B. at the same time agreeing to reconvey it upon payment of \$522, 97 at two instalments, the last within three years from the date of the contract; no part thereof having been paid, it was held that B. was not liable to a *qui tam* action for taking usurious interest. *Thomes vs. Cleaves*. 7 Mass. 361.

7. A. receives B's note for \$400, payable at a day certain, and delivers him the amount secured, deducting interest for the time the note has to run, at the rate of two per cent. per month on the \$400. In an action on the note by A. the defendant prevailed, on the ground that the contract was usu-

SECT. 2. *Be it further enacted*, That when any person or persons shall be sued on any bond, contract, mortgage or assurance for the payment of any monies, wares, merchandise or other commodities, whereby or wherein any sum is given, secured or taken for the forbearing or giving day of payment for a longer or shorter time, then, if the creditor be alive, and the debtor or debtors, shall come into Court, where the said cause is to be tried (*f*), and shall offer to make oath (*g*), and if required by the Court, shall actually swear to the same, that there is taken, reserved or secured by such bond, contract or assurance, above the rate of six dollars in the hundred, for the forbearance of the property actually lent or sold, whether it be in money or other things, for one year, and so after that rate for a greater or lesser sum, or for a longer or shorter time, or that the creditor or creditors have received more than at the rate of six dollars in the hundred,* for the loan or forbearance of the monies or other things actually lent or sold ; such bond, contract, mortgage

CH. 19.

In suits on a usurious security, Defendant may prove the usury by his oath,

[Ib. § 2.]

[*100]

rious. In a *qui tam* action for the penalty prescribed by the statute, it was held that A. was not liable. *Simpson vs. Warren*, 15 Mass. 460.

(*f*) 1. The party giving a usurious security is in all cases entitled, at some time, to avoid it by showing the usury, unless he has waived it by his own act, or forfeited it by his own neglect. *Richardson vs. Field*, 6 Glf. 35.

2. But after the general issue has been pleaded, the court will not allow it to be withdrawn, that the defendant may tender his oath. *Cotton vs. Lake*, 2 Mass. 540.

(*g*) 1. The statute in this contemplates cases only where the original contracting parties are also parties to the suit. *Putnam vs. Churchill*, 4 Mass. 516 ; *Binne vs. Merchant*, 6 ib. 193.

2. In an action by the *indorsee* of a promissory note against the promisor, the defendant cannot tender his oath in verification of a plea of usury, under this statute. *Putnam vs. Churchill*, 4 Mass. 516.

3. The defendant's remedy in such case is, by pleading usury to the country, and submitting his evidence to a jury. *Binne vs. Merchant*, 6 Mass. 193.

4. Nor can the promisor be allowed to prove that the suit is brought for the original promisee, though in the name of an indorsee. *Ib. Brigham vs. Mearns*, 7 Pick. 40.

5. All the plaintiffs, or defendants on a side must swear, when the oath is resorted to, to enforce, or avoid a contract. *Knights vs. Putnam & al.* 3 Pick. 171.

CH. 19.

unless credit-
or will swear
the security is
not usurious.

This act not
to extend to
certain con-
tracts.

or assurance shall be utterly void ; and the debtor fully and absolutely discharged from the payment of any monies, goods or other things lent, exchanged, bargained, sold or agreed for as aforesaid, *unless* the creditor or creditors will swear (h) that he, she or they have not, directly nor indirectly, wittingly taken or received more than after the rate of six dollars in the hundred, for forbearance or giving day of payment : and (i) by such bond, contract, mortgage or assurance, there is ~~not reserved~~, secured or taken more than after the rate of six per centum, for forbearance or giving day of payment, for the goods, monies, or other things actually lent or sold, any law, usage or custom to the contrary notwithstanding : *Provided*, nothing in this Act shall extend to the letting of cattle (j), or other usages of the like nature in practice amongst farmers, or maritime contracts among merchants, as bottomry, insurance, or course of exchange, as hath heretofore been practised. [Approved March 20, 1821.]

[A party to an usurious negotiable security cannot be a witness to defeat the security on the ground of usury. *Churchill vs. Suter*, 4 Mass. 156; *Widgery vs. Munroe*, 6 Mass. 451; *Manning vs. Wheatland*, 10 Mass. 502.

Where an endorsed promissory note was made and discounted for the benefit of the maker, at usurious interest, and thus first put into circulation, the maker was held an incompetent witness to prove the usury. *Hartford Bank vs. Barry*, 17 Mass. 94.

One who signs a negotiable note as agent of another, is an incompetent witness to prove the note usurious in an action by the indorsee against the promisor. *Packard vs. Richardson & als.* 17 Mass. 122.]

(h) The Plaintiff's oath must be administered in Court, and not taken by *dedimus*. *Frye vs. Barker & al.* 2 Pick. 65.

(i) 1. The word *and*, is to be taken distributively, i. e. as a substitute in meaning for the word, *or*. Hence, where the defendant pleads that by the contract sued there is *reserved* more than lawful interest, and tenders his oath ; it is sufficient for the plaintiff to reply that such interest is not *reserved*, and to swear to the same : without averring that unlawful interest has not been taken or received. *Darling vs. Homer & al.* 16 Mass. 258.

2. A plea that the plaintiff had received, and another that he had taken and received unlawful interest, were held good on demurrer. *Frye vs. Barker & al.* 1 Pick. 267.

(j) Where on the hiring of a cow for a year, and a promise to return her in a year with \$6 in cash, and if not then delivered to pay \$6 a year until delivered ; it was holden, that the promisee was entitled to the \$6 for one year only, and legal interest afterwards on that sum and on the value of the cow, until the delivery, and on the sum so due until payment. *Baxter & als. vs. Wales*, 12 Mass. 365.

Chapter 20.

CH. 20.

AN ACT to prohibit certain Officers of Courts from buying Promissory Notes and other demands, for the purpose of making a gain or profit in the collection thereof.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall, with an intent thereby to procure himself to be retained as an Attorney, or employed as a Justice of the Peace, Sheriff, Deputy Sheriff, Coroner or Constable, in the collection of any note, account or other demand whatever, by a suit at law, or with an intent thereby to procure and obtain any promissory note, account, or other demand for the purpose of making to himself any gain or profit from the writs or fees, arising in the collection thereof, by a suit at law, directly or indirectly loan or advance any sum or sums of money ; or shall promise to loan or advance any sum or sums of money ; or shall forbear and give day of payment ; or shall promise to forbear and give day of payment of any sum of money due on any* demand left with such person to be by him collected ; or shall pay or assume to pay any debt of any person whatever ; or shall purchase any goods or chattels, or shall give or promise any valuable consideration whatever, with an intent thereby to procure and obtain any promissory note, account or other demand, for the purpose of making to himself any gain or profit, from the writs or fees arising in the collecting thereof, by a suit at law ; every person so offending shall forfeit and pay a sum, not more than five hundred, nor less than twenty dollars, for each and every offence, to be recovered by indictment in the Supreme Judicial Court ; in which case the forfeiture shall enure to the State ; or by action before any Court, proper to try the same ; in which case the forfeiture shall accrue, one moiety to him or them, who shall first sue and prosecute for the same, and the other moiety to the use of the County where such action may be prosecuted. [Approved February 19, 1821.]

No Attorney, Justice, Sheriff, Coroner, or Constable to loan or advance money, &c. to obtain demands for suit or collection, with intent thereby to make profit, &c.

[Mass. Stat. June 24, 1811.]

[*101]

Punishment.

[†Or C. C. P. See ch. 233, Vol. 3, p. 63.]

Appropriation of penalty.

CH. 21.

Chapter 21.

AN ACT to prevent Bribery and Corruption.

Penalty for giving a bribe.

[†Mass. Stat. 1769. § 1.]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall directly or indirectly, give or engage to pay, any sum of money, or other valuable consideration to another, in order to induce such other person to procure for him, by his interest, influence or any other means whatsoever, any office or place of trust, within this State, and be thereof convict, shall forfeit a sum not exceeding three hundred dollars, nor less than fifty dollars, at the discretion of the Court which shall have cognizance of the same ; and be rendered forever after incapable of sustaining any office or place of trust, within this State.

Penalty for receiving a bribe.

[Ib. § 2.]

[*102]

SECT. 2. *Be it further enacted*, That if any person shall receive of another, any sum of money or other valuable consideration, as a reward for procuring or to procure any office or place of trust within this State, for any other person,* and be thereof convicted, shall forfeit a sum not exceeding three hundred dollars, nor less than fifty dollars, at the discretion of the Court which shall have cognizance of the same ; and if such offender be in any such office, he shall on the conviction, be disabled from holding the same, and be forever after incapable of sustaining any office or place of trust within this State ; and for the more easy conviction of such offenders :

Either party prosecuting the other, shall be freed from the penalty.

[Ib. § 3.]

SECT. 3. *Be it further enacted*, That if either the parties offending as aforesaid, shall give information upon oath, against the other offending party, and shall duly prosecute said information ; such informer shall be freed from every of the penalties aforesaid. And all offences against this act shall be heard, tried and determined before the Supreme (a) Judicial Court ; and all pecuniary penalties accruing thereby, shall be one third thereof to the informer, and the other two thirds to the State. [Approved March 15, 1821.]

Appropriation of penalties.

(a) Or C. C. Pleas ; See ch. 233, Vol. 3, p. 63.

Chapter 22.

CH. 22.

AN ACT for the protection of the Personal Liberty of the Citizens, and for other purposes.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall transport or carry, or cause to be transported or carried, any subject of this State, or other person lawfully residing and inhabiting therein, to any part or place without the limits of the same, by land or water, without his consent or voluntary agreement; or in order to remove such person from one part of the State to another part of the same, except for the purpose of defending the same in time of war, agreeable to the Constitution, or except such person be sent by due course of law, to answer for some criminal offence committed in some other of the United States of America; every person so offending, and every person aiding and abetting the same, being duly convicted thereof before the Supreme (a) Judicial Court, shall be punished by fine not exceeding two thousand dollars, and imprisonment not exceeding two years,* or by solitary† imprisonment for a term not exceeding three months, and confinement to hard labour for a term not exceeding five years; or any one or more of those punishments, at the discretion of the said Court, and be further liable to the action of the party grieved.

Punishment for transporting any inhabitant from one part of this State to another, except, &c.

[Mass. Stat. Mar. 16, 1785, § 10.]

[*103]

[†abolished; See Laws, ch. 368, Vol. 3, p. 221.]

SECT. 2. **Be** it further enacted, That every master or commander of any outward bound ship or vessel, that shall hereafter carry or transport out of this State any person under the age of twenty-one years, or any apprentice, or any indented servant, to any parts beyond sea, without the consent of his parents, master, or guardian, shall forfeit and pay the sum of two hundred dollars; one moiety to the use of this State, and the other moiety to him or them that shall sue for the same; and be further liable for the damages sustained by the parent, master or guardian, in a special action of the case.

No master of vessel to transport minors, &c. out of State, without consent of parents, &c.

[Ib. § 11.]

SECT. 3. **Be** it further enacted, That if any person within this State shall hereafter enlist or cause to be enlisted, into

Punishment for enlisting minors with-

(a) Or C. C. Pleas; See ch. 233, Vol. 3, p. 63.

CH. 22. the army of the United States, any minor under the age of twenty-one years, knowing him to be such minor, without the consent in writing of his parent, guardian and master, and such minor shall within six months after his enlistment be removed out of this State, so that he cannot be had before the Judicial Tribunals of this State, by virtue of a writ of *habeas corpus*, the person so enlisting such minor, or so causing him to be enlisted, on conviction thereof, before the Supreme Judicial Court, shall forfeit and pay a fine not exceeding five hundred dollars, or be imprisoned for a term not exceeding one year.

out consent of parents, &c. in writing, into U. S. army, knowing them to be minors and sending them out of the State.

[Mass. Stat. Feb. 28, 1815, § 1.]

Forpersuading a minor, knowing him to be such, to depart from State with intent so to enlist him.

[Ib. § 2.]

Fines, &c. how recovered and appropriated.

[*104]

[Ib. § 3.]

Persons concerned may have the benefit of habeas corpus act.

[†See ch. 64, in this Vol.]

Punishment for knowingly bringing into the State by sea, any persons convicted of infamous crimes, or of infamous character, &c.

SECT. 4. *Be it further enacted*, That if any person, knowing any one to be a minor under the age of twenty-one years, shall persuade him to depart from this State, with intent to enlist into the army of the United States, without the consent of his parent, guardian and master, on the conviction thereof, before the Supreme Judicial Court, shall forfeit and pay a fine not exceeding five hundred dollars, or be imprisoned for a term not exceeding one year.

SECT. 5. *Be it further enacted*, That all fines and forfeitures, incurred by virtue of the third and fourth sections of this act, shall be recovered by indictment, or information, in the* Supreme Judicial Court, to the use of the State: *Provided*, That the said Court, in which any such fine or forfeiture shall be recovered, may award to the parent, guardian or master of such minor, such part of such fine or forfeiture, so recovered, not exceeding the one moiety thereof, as they in their discretion, shall think proper; *Provided also*, That all persons concerned shall be entitled to all the privileges and subject to all the penalties and requisitions, given and incurred in an act, entitled “An Act directing the process in habeas corpus†,” where the same do not contravene the provisions of this act.

SECT. 6. *Be it further enacted*, That if any master or other person, having charge of any vessel, shall therein bring into, and land, or suffer to be landed in any place within this State any person, before that time convicted in any other State, or in any foreign country, of any infamous crime, or any for which he hath been sentenced to transportation, know-

ing of such conviction, or having reason to suspect it, or any person of a notoriously dissolute, infamous, and abandoned life and character, knowing him or her to be such, shall, for every such offence, forfeit the sum of four hundred dollars, one half thereof to the use of the State, and the other half to the use of any person, being a citizen of, and residing in this State, who shall prosecute and sue for the same by action of debt as aforesaid. [Approved February 24, 1821.]

CH. 23.

[Mass. Stat.
Feb. 26, 1794,
§ 16.]

Appropriation
of penalty.

Chapter 23.

AN ACT against selling unwholesome Provisions.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall sell any diseased, corrupted, contagious or unwholesome provisions, whether for meat or drink, knowing (a) the same, without making it known to the buyer, and being thereof convicted before the Circuit Court of Common Pleas, in the County where such offence shall be committed, or the Justices of the Supreme Judicial Court, he shall be punished by fine,* imprisonment, or by solitary† imprisonment for a term not exceeding three months, and confinement to hard labour for a term, not exceeding five years, and binding to the good behaviour, or one or more of these punishments, to be inflicted according to the degree and aggravation of the offence, if such conviction be had in the Supreme Judicial Court; and if such conviction be had before the Circuit Court of Common Pleas, shall be punished by fine not exceeding one hundred dollars, and binding to good behaviour. [Approved February 20, 1821.]

Punishment
for selling un-
wholesome
provisions.

[Mass. Stat.
Mar. 8, 1785.]

Conviction in
S. J. Court, or
C. C. Pleas.

[*1051
†abolished;
See ch. 366,
Vol. 2, p. 221.]

[An action for deceit in a sale of provisions can only be maintained, where an affirmation or representation wilfully false, or some artifice is proved, or is necessarily to be presumed from the circumstances and nature of the bargain, and the situation of the parties. *Emerson & als. vs. Bridgham & als.* 10 Mass. 197.

If a victualler sells meat as fresh to his customers, at a sound price, which at the

(a) Such knowledge will not be inferred from the mere fact that the provisions were unwholesome. *Hemmenway & al. vs. Woods*, 1 Pick. 526.

CH. 24.

time was stale and defective, or unwholesome from the state in which the animal died, this knowledge of the defect will be presumed from the nature and duties of his calling and trade. *Ib.*]

Chapter 24.

AN ACT for the Prevention and Removal of Nuisances.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That the Selectmen of every town in this State, where the Selectmen thereof, together with any two Justices of the Peace in the same County, shall judge such regulation to be necessary, shall from time to time, as occasion shall be, assign some certain places for the exercising of any of the trades or employments of killing creatures for meat, distilling of spirits, trying of tallow or oil, currying of leather, and making earthen ware,† and forbid and restrain the exercise of either of them in other places not so approved and allowed; and all assignments of such houses or places by Selectmen, with the assent of two or more Justices, for the exercise of any of the occupations aforesaid, shall be entered in the town book where such Selectmen respectively belong; and also made known by having notifications thereof posted up in some public places in the same town.

Selectmen, with two Justices, may assign places for slaughter houses, distilleries, &c.

[Mass. Stat. June 7, 1785, § 1.]

[†Respecting manufacture of bricks, see ch. 353, Vol. 3, p. 199.]

Assignments to be entered on town book and notice thereof posted.

Penalty for carrying on any such business, except in places so assigned.

[Ib. § 3.]

Mode of recovery and appropriation of the penalty.

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SECT. 2. *Be it further enacted,* That if any distiller, tallow chandler, manufacturer of oil, currier, butcher or potter, shall make use of any house or place, other than such as are or may be assigned and permitted, in consequence of this act, for the exercise of the employments aforesaid, or any of them, the person so offending shall forfeit and pay a fine of twenty dollars, one half thereof for the use of this State, and the other half part for the use of him or them that shall prosecute and sue therefor, by action of debt, in* the Circuit Court of Common Pleas; and if convicted on the presentment of a Grand Jury in said Court, or Supreme Judicial Court, the whole penalty shall enure to the use of the State; and in either case the offender shall also enter into recogni-

sance, in such sum as the same Court shall order, not to improve such building for either of the said purposes, for the term of three years then next ; and in default of entering into such recognisance, to be committed to the common gaol ; or such building may be taken down by the order of the same Court, as being a common nuisance ; and the materials, or such part of them as may be necessary, sold at public auction, to defray the expense and charges ; and in case the materials shall be insufficient, the residue of the charges to be levied by distress and sale of the offender's goods and chattels.

SECT. 3. *Be it further enacted*, That when any house, assigned for the exercising of either of the aforesaid trades or employments, becomes a nuisance by reason of offensive and ill stench proceeding from the same, or becomes otherwise hurtful or dangerous to the neighborhood or travellers, it shall and may be lawful to and for the Circuit Court of Common Pleas within the County, to cause inquiry to be made therein by a jury, and to suppress such nuisance by prohibiting and restraining the further use thereof for the exercise of either of the aforesaid trades or employments, under a fine not exceeding ten dollars a month, to the use of the poor of the town ; or by causing such nuisance to be removed or prevented, as the Justices of said Court, in their discretion, shall think expedient and necessary. And it shall also be lawful for any person or persons, who may be aggrieved by reason of such offensive and ill stench, to give notice thereof to the proprietor or occupant of such house, so deemed to be a nuisance ; and if the proprietor or occupant shall not forthwith remove the same nuisance, and if upon trial as hereinafter provided, the same shall be considered and deemed a nuisance, the owner, proprietor or occupant of such house, shall forfeit and pay the sum of twenty dollars, for each and every month which the said nuisance shall continue, after such notice as aforesaid ; to be recovered by action of the case, by any person who shall first sue for the same ;* and in such action it shall be lawful for the defendant to tender the general issue, and give any special matter in evidence : And, if, upon such trial, it shall appear to the Jury,

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Offender to recognize not to pursue the business, &c. for three years, or be committed—
or the buildings may be taken down as a nuisance, & the materials sold.

When any house, assigned as aforesaid becomes a nuisance, it may be suppressed by the C. C. Pleas.

[Ib. § 2.]

Persons aggrieved by nuisance may notify owner or occupant, and if on trial found to be a nuisance—penalty if not removed.

[Mass. Stat. Mar. 4, 1800, § 1.]

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CH. 24. who shall try the same cause, that the said house so complained of, is not a nuisance, it shall be their duty to acquit the defendant, and he shall be entitled to his costs.

Persons injured may recover damages.

[Mass. Stat. Mar. 4, 1800, § 1.]

SECT. 4. *Be it further enacted*, That any person or persons, who may be injured by any such nuisance, either in his comfort or the enjoyment of his estate, may have and maintain his special action on the case, for the injury and damage which he or they may sustain, by reason of such nuisance; in which action it shall and may be lawful for the defendant to plead the general issue, and give any special matter in evidence.

Fences on public landings, considered nuisances.

[Mass. Stat. June 7, 1795, § 4.]

SECT. 5. *Be it further enacted*, That all fences or buildings set up and erected on lands now used and improved as public landing (a) places, or such as may be hereafter laid out and appropriated to that use, without lawful permission therefor, shall be esteemed nuisances, and may be abated as such. And whereas the laws now in force are inadequate to so speedy a removal of nuisances as the exigencies of the public may require: Therefore,

Two Justices, quorum unus, may inquire by a Jury into all nuisances,

[Mass. Stat. June 19, 1801, § 1.]

and cause them to be abated.

SECT. 6. *Be it enacted*, That any two Justices of the Peace, *quorum unus* (b), shall be, and they hereby are authorized to inquire by a Jury, as is hereinafter directed, into all nuisances erected, or which may hereafter be erected by any person or persons; and if it be found, upon such inquiry, that a nuisance shall have been erected, created or continued by any person or persons, then, that such Justices shall cause the same to be abated and removed.

Complaint to be made to such Justices,

[Ib. § 2.]

SECT. 7. *Be it further enacted*, That any person or persons may make out his or their complaint in writing, directed to any two Justices of the Peace, *quorum unus*, of any existing nuisance; and they shall as soon as such complaint is ex-

(a) 1. Neither the Selectmen, nor the inhabitants of a town have authority to lay out public landings. *Bethum vs. Turner*, 1 Glf. 111.

2. Nor can a town discontinue such landings. *Com. vs. Tucker*, 2 Pick. 44.

3. A fence erected thereon by order of a town, may be abated as a nuisance. *Ib.*

(b) It is only necessary that one of the Justices in such case, should be of the quorum. *Gilbert vs. Sweetsir*, 4 Glf. 488.

hibited to them, make out their warrant, under their hands and seals, directed to the Sheriff of the same county, commanding him, in behalf of the State, to cause to come before them, twelve good and lawful men of the same county, who shall be drawn in equal proportion out of the Jury box, by the Selectmen of the three towns next adjoining to the town in* which such nuisance may be, at a meeting of such Selectmen, to be holden forthwith for that purpose, upon the requisition of such Sheriff, and they shall be empowered to inquire into the nuisance complained of, which warrant shall be in the form following, viz :

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who may issue warrant to Sheriff to empannel a Jury.

[FORM OF WARRANT.]

(SEAL.) H—ss, To the Sheriff of the County of ———, Greeting.

Whereas complaint is made to us, the subscribers, two of the Justices of the Peace, within and for the County of ———, *quorum unus*, by ——— of ——— in the same county, that ——— of ——— upon the ——— day of ———, at ———, with force and arms, did unlawfully erect or cause to exist, a nuisance of the following description, viz; [here particularly describe the nuisance] and the same nuisance unlawfully and unjustly, and with like force and arms, doth still keep up and continue. You are, therefore, in behalf of the State, commanded to cause to come before us, upon the ——— day of ———, at ———, in the same county, twelve good and lawful men of your County, each one of whom having freehold of the yearly value of ten dollars, to be empannelled and sworn to inquire into the nuisance afore described. Given under our hands and seals, this ——— day of ——— in the year of our Lord ———.

Form of the warrant.

R. S. } Justices of the Peace,
N. O. } *quorum unus*.

And the said Justices shall make out their summons to the party complained against, in the form following :

Person complained of to be notified.

[FORM OF THE SUMMONS.]

STATE OF MAINE.

H—ss. To the Sheriff of the County of ———, or either of his Deputies, Greeting.

Form of Summons.

We command you, that you summon ———, to appear before the subscribers, two of our Justices of the Peace, within and for our said County of ———, *quorum unus*, at a place called ———, in D——, in the said County, at ——— o'clock in the ——— noon; then and there to answer to the complaint of ——— to them exhibited; wherein it is stated that [here recite the complaint;] and you are to make a return of this writ, with your doings therein, unto our said Justices, upon or before the said ——— day* of ———. Witness our said Justices, the ——— day of ——— in the year of our Lord ———.

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R. S.
N. O.

Which Summons shall be served upon the party complained against, by reading the same in his hearing, or by a copy thereof, left at his usual place of abode, fourteen days exclu-

Mode of service.

CH. 24. sively, before the day of trial ; and if the party shall not appear to defend, the Justices shall proceed to the inquiry in the same manner as if he were present ; and when the Jury shall appear, the Justices shall lay before them the exhibited complaint, and shall administer the following oath, viz :

Justices Pro-
ceedings.

Foreman's
Oath.

[FOREMAN'S OATH.]

You, as Foreman of this Jury, do solemnly swear, that you will well and truly try whether the complaint of —, now laid before you, be true, according to your evidence. So help you God.

The other Ju-
ror's Oath.

THE OTHER JUROR'S OATH.

The same oath which your Foreman hath taken, on his part, you and each of you shall well and truly observe and keep. So help you God.

And if the Jury shall find the complaint to be true, then they shall return their verdict in the form following :

Form of the
Verdict.

[FORM OF THE VERDICT.]

At a Court of inquiry, held before R. S. and N. O. Esquires, two of the Justices of the Peace within and for the said County of —, *quorum unus*, at D— in the said County of — upon the — day of — in the year of our Lord—, the Jury upon their oaths do find, that — is a nuisance, and that the same, on or before the — day — at — with force and arms, unjustly and unlawfully was erected, or caused to exist, by — of —; and that the said —, with like force and arms, unjustly and unlawfully, still continues and keeps up the same nuisance. Wherefore the Jury find upon their oaths aforesaid, that the said nuisance ought to be abated and removed without delay.

And if by accident or challenge, there shall happen not to be a full Jury, the Sheriff shall fill the panel, *de talibus circumstantibus* as in other causes. And if the Jury, after a full hearing of the cause, shall find the complaint laid before them supported by evidence, they shall all sign their verdict, in form aforesaid ; otherwise the defendant shall be allowed his legal costs, and have* his execution therefor, under the hands and seals of said Justices.

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SECT. 8. *Be it further enacted,* That if the Jury shall return their verdict, signed by the whole panel, that the complaint is supported, the Justices shall enter up judgment for the complainant to have the nuisance abated and removed, and shall award their writ accordingly in form following :

Form of Writ
of removal.

[FORM OF THE WRIT OF REMOVAL.]

STATE OF MAINE.

H—ss. To the Sheriff of our County of —, or to either of his Deputies,
Greeting.

Whereas, at a Court of Inquiry for abatement and removal of a nuisance, held at D— in our County of — upon the — day of — in the year of our

Lord —, before —, Esqrs. two Justices of the Peace for our said County of —, *quorum unus*, the Jurors empannelled and sworn by our said Justices, did return their verdict in writing, signed by each of them, that the — aforesaid, [describe as follows, as in the verdict] is a nuisance; and that the same, on or before the — day of —, at — with force and arms, and unjustly and unlawfully was erected and caused to exist, by — of —; and that the said —, with like force and arms, unjustly and unlawfully still continues and keeps up the same nuisance; Whereupon it was considered by our said Justices, that the said nuisance be abated and removed: We therefore command you, that, taking with you the force of the County, if necessary, you cause the said nuisance forthwith to be abated and removed; and also that you levy of the goods, chattels or lands of the — the sum of —, being costs taxed against him in the trial aforesaid, together with —, being the sum estimated by the said Justices as necessary costs, which will arise in the abatement and removal of said nuisance, together with thirty-three cents more for this writ, and also your own lawful fees. And for want of such goods, chattels or lands of the said —, by you to be found, you are to take the body of the said —, and him commit to our gaol in L. in our said County of H—, there to remain until he shall pay the sums aforesaid,* together with all fees on the service of this writ, or until he is delivered by order of law; and make return of this writ, with your doings thereon, within thirty days next coming. Witness our said Justices at D. aforesaid, the — day of — in the year of our Lord —.

R. S

N. O.

[*111]

Provided nevertheless, That the party complained against, as aforesaid, may, in person or by attorney, appear before the said Justices, and may there give in evidence, on the trial aforesaid, under the general issue, any special matter or thing of which he could avail himself under any special plea in the regular Courts of law: *Provided also*, That when judgment shall be entered up against him upon the verdict of the Jury aforesaid, he may there appeal from the judgment of the said Justices, to the next Supreme Judicial Court, to be holden in the same County; which appeal, when so entered, shall stop all further proceedings of the said two Justices, and no writ on said judgment for abatement and removal shall issue, except as herein after directed: And it shall be the duty of the person appealing, as aforesaid, from the judgment of the said Justices, to procure attested copies of all the papers in said complaint, under the hands of the said Justices, and to enter his appeal at the next Supreme Judicial Court; and if he shall fail of so doing, the judgment of the said two Justices shall be in full force against him; and they are hereby authorized and empowered, in such case, to issue their writ for abatement and removal, in the same manner, as if no appeal had been entered.

Respondent may give special matter in evidence under general issue;

and appeal to Sup. J. Court.

Proceedings before Justices stayed by entry of appeal.

Appellant to produce copies and enter appeal,

or the judgment of the Justices shall be in full force, and they may abate the nuisance.

CH. 25.

Proceedings
on the appeal
in Sup. Judi-
cial Court.

[Ib. § 4.]

[*112]

Same costs to
be allowed as
in Courts of
law.

[Ib. § 5.]

SECT. 9. *Be it further enacted*, That the said Supreme Judicial Court, be, and they hereby are authorized to take cognizance of said complaint and judgment, and to try by the Jurors returned to serve in their said Court, on the Jury of trials, the truth of the facts alleged in said complaint, under the issue aforesaid, and if the said Jury shall find by their verdict, the facts alleged in said complaint to be true, the said Court are further authorized to cause and order the said nuisance to be abated and removed, and to award against the party complained of, such sums as may be necessary to* defray the expense of removing said nuisance. But if the Jury aforesaid shall find, that the facts alleged in said complaint are not supported, the party complained of shall recover against the complainant his legal costs, and execution shall issue accordingly.

SECT. 10. *Be it further enacted*, That the same costs shall be allowed by the said two Justices and the Supreme Judicial Court, to parties and witnesses, as are allowed in the regular Courts of law; and that the said two Justices, *quorum unus*, shall have the same fees, and be allowed the same sums for the trial aforesaid, as are allowed to Justices in the process of forcible entry and detainer. [Approved March 8, 1821.]

Chapter 25.

AN ACT for the prevention of **damage** by Fire, and the safe keeping of Gun Powder.

Selectmen to
make regula-
tions as to the
keeping of gun
powder in cer-
tain towns.

[Mass. Stat.
June 18, 1816,
§ 1.]

SECT. 1. **BE** *it enacted by the Senate and House of Representatives, in Legislature assembled*, That the Selectmen of each town within this State, containing not less than fifteen hundred inhabitants, be, and they hereby, are authorized and empowered to make rules and regulations, from time to time, in conformity with which, all gun powder which is or may be within such town, shall be kept, had or possessed therein; and no person or persons shall have, keep or possess within such town, any gun powder, in any quantity, man-

ner, form, or mode, other than may be prescribed by the rules and regulations aforesaid. CH. 25.

SECT. 2. *Be it further enacted*, That any person or persons who shall keep, have or possess any gun powder, within any town, contrary to the rules and regulations which shall be established by the Selectmen of such town, according to the provisions of this act, shall forfeit and pay a fine of not less than twenty dollars, and not exceeding one hundred dollars, for each and every offence, to be recovered by action of debt in any Court proper to try the same.

Penalty for violating such regulations.

[Ib. § 7.]

Mode of recovery.

SECT. 3. *Be it further enacted*, That all gun powder which shall be had, kept or possessed, within any town, contrary to the rules and regulations which shall be established by the Selectmen* of such town, according to the provisions of this act, may be seized by any one or more of the Selectmen of such town, and shall, within twenty days next after the seizure thereof, be libelled, by filing with any Justice of the Peace in such town, a libel, stating the time, place and cause of seizure, and the time and place when and where trial shall be had before said Justice, and a copy of said libel shall be served by the Sheriff or his deputy, on the person or persons in whose possession the said gun powder shall have been seized, by delivering a copy thereof to each such person, or leaving such copy at his or her usual place of abode, seven days at least, before the time which shall be specified in said libel, for the trial thereof, that such person may appear, and show cause why the gun powder, so seized or taken, should not be adjudged forfeit; and if any person shall appear to show cause why the same should not be adjudged forfeit, such appearance shall be entered of record, by said Justice; and if the gun powder, seized as aforesaid, shall be adjudged forfeit, the person or persons, whose appearance shall have been recorded as aforesaid, shall pay all costs of prosecution, and execution shall issue therefor: *Provided however*, That the person or persons, whose appearance shall have been recorded, may appeal from the judgment rendered by said Justice of the Peace, to the next Court of Common Pleas to be holden for the county where such town is situated; and the party so appealing, before

Powder kept contrary to regulations may be seized and libelled.

[*113]

Proceedings on such libel.

Appeal from Justice's judgment.

CH. 25. such appeal shall be allowed, shall recognize, with sufficient surety or sureties to the libellant, to prosecute his said appeal and to pay all such costs as may arise after said appeal ; and no further proceedings shall be had upon the judgment appealed from ; and in case the party appealing shall neglect to enter his appeal, the Court appealed to, may, upon complaint, proceed to affirm the judgment of the Justice, with additional costs.

After proceedings.

Persons damaged by explosion of powder illegally kept, may obtain redress.

[Ib. § 9.]

[*114]

SECT. 4. *Be it further enacted,* That any person, who shall suffer injury by the explosion of any gun powder, had or possessed, or being within any town, contrary to the rules and regulations which shall be established in such town, according to the provisions of this act, may have an action of the case in any Court proper to try the same, against the owner* or owners of such gun powder, or against any other person or persons, who may have had the possession or custody of such gun powder, at the time of the explosion thereof, to recover reasonable damages for the injury sustained.

Selectmen may enter buildings to search for powder.

[Ib. § 10.]

SECT. 5. *Be it further enacted,* That it shall, and may be lawful for any one or more of the Selectmen of any town to enter any building, or other place, in such town, to search for gun powder, which they may have reason to suppose to be concealed or kept, contrary to the rules and regulations which shall be established in such town, according to the provisions of this act, first having obtained a search warrant therefor according to law.

Penalty for suffering stoves, chimnies or stove pipes to be defective, &c.

Action of case.

SECT. 6. *Be it further enacted,* That when any stove, chimney or stove pipe, within any town containing not less than fifteen hundred inhabitants, shall be defective, or out of repair, or so constructed or placed, that any building, or other property shall be in danger of fire therefrom, the Selectmen of said town shall give notice, in writing, to the possessor or possessors of such stove, chimney or stove pipes, to remove or repair the same ; and if such possessor shall for the term of six days after the giving of such notice, unnecessarily neglect to remove, or effectually repair such stove, chimney or stove pipes, such possessor shall, for each and every such neglect, forfeit and pay a fine of not less than ten dollars, nor more than fifty dollars, to be recovered by action of the case, in any Court, proper to try the same.

SECT. 7. *Be it further enacted*, That the fines, forfeitures and penalties, which shall arise under this act, shall accrue, one moiety thereof to the use of the town within which the offence shall be committed, and the other moiety to the use of the person who shall prosecute or sue for the same.

CH. 26.

Appropriation of fines, &c.

[Ib. § 13.]

SECT. 8. *Be it further enacted*, That the rules and regulations, which shall be established in any town, according to the provisions of this act, shall be of no force or effect, until such rules and regulations, together with this act, shall have been published by the Selectmen of such town, three weeks successively, by printing in some newspaper printed within the County, or by posting up attested copies in three several public places in said town. [Approved March 19, 1821.]

Above regulations not to be in force till published by Selectmen, &c.

[Towns may prohibit the burning of bricks, or the erecting of brick-kilns, within certain parts thereof. See "An Act for the further protection of towns from fire," ch. 363, vol. 3, p. 199.]

Chapter 26.*

[*115]

AN ACT to prevent damage from firing Crackers, Squibs, Serpents, and Rockets, within this State.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall offer for sale, set fire to, or throw any lighted cracker, squib, rocket or serpent within this State, without the license of the Selectmen of the several towns, respectively, first obtained therefor, he shall forfeit, for every such offence, the sum of five dollars; one moiety to the use of the poor of that town, in which the offence shall be committed, and the other moiety to the use of the prosecutor; to be recovered by action of debt or by information before any Justice of the Peace of the county, in which the offence shall be committed, with the costs of suit. [Approved February 20, 1821.]

Crackers, squibs, &c. not to be fired without license.

[Mass. Stat. Mar. 4, 1806.]

Punishment.

Chapter 27.

AN ACT more effectually to secure Fire Engines from being injured.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That if any person shall,

CH. 28. wantonly or maliciously, spoil, break, injure, damage or render useless any engine, or any of the apparatus thereto belonging, prepared by any town, society, person or persons, for the extinguishment of fire, and shall be convicted thereof, before the Supreme Judicial Court, he shall be punished by a fine not exceeding five hundred dollars, or by imprisonment, not exceeding two years, at the discretion of the Court; and be further ordered to recognize, with sufficient surety, or sureties, for his good behaviour for such term as the Court shall order. [Approved March 2, 1821.]

Persons wantonly injuring fire engines, [Mass. Stat. Feb. 8, 1902.] punished on conviction in S. J. Court.

[*116]

Chapter 28.*

AN ACT for the prevention of Lotteries not authorized by law, and to prohibit the sale or purchase of Tickets in this State.

[Repealed by ch. 327, § 5, Vol. 3, p. 174.]

§ 1, Provided, that no person should make a lottery, or advertise any lottery scheme, unless the same had been granted by Congress, or the Legislature of this State.

§ 2, Prohibited the sale of tickets in any lottery not so granted.

§ 3, Prohibited the purchase of tickets in any lottery not so granted.

§ 4, Prohibited the possession of such tickets, with intent to sell.

§ 5, Prescribed the penalties, and mode of recovery.

§ 6, Prescribed the time for the act to take effect.]

[Approved March 15, 1821.]

Additional Act, ch. 230, Vol. 3, p. 61.

[*117]

Chapter 29.*

AN ACT for preventing abuses in distilling of Strong Liquors, with Leaden Heads or Pipes.

Penalty for distilling through leaden heads, pipes and worms.

[Mass. Stat. 1723, § 1.]

[Ib. § 2.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That if any person shall presume to distil or draw off any spirits or strong liquors through leaden heads, worms or pipes, upon legal conviction thereof, before any Court of competent jurisdiction, shall forfeit and pay a sum of three hundred dollars.

SECT. 2. *Be it further enacted,* That no brazier, pew-

terer, or other artificer whatsoever, shall presume to make any worm or head (for distilling) of coarse and base pewter, or such as hath any mixture of lead in it, under the penalty of three hundred dollars.

CH. 29.

Worms, or heads not to be made of base metal.

SECT. 3. *Be it further enacted*, That in each town within this State, where the distilling trade is carried on, it may be lawful for the inhabitants thereof, at their annual town meeting for choice of town officers, to choose two or more Assay Masters, whose business it shall be to inspect and make trial of any such heads and worms, as shall be suspected by them; and if, upon their assaying and trial of them, they be found to be made of lead, or of other base metal, or to have an alloy of lead, or other base metal in them, they shall give notice thereof to the distiller or owner thereof, who is hereby forbidden to make any further use thereof, in distilling, under the aforesaid penalty of three hundred dollars.

Towns may choose Assay Masters to inspect and try heads and worms.

[Ib. § 3.]

SECT. 4. *Be it further enacted*, That the Assay Masters or Inspectors are hereby empowered to enter into any Still-house or place, where such utensils are suspected to be kept, and to cut off so much of them as shall be needful to make an assay or trial of them. And every distiller shall be obliged to produce a certificate, under the hands of the Assay Masters, for the time being, for all the pewter heads and worms which they shall make use of in distilling, that they have been tried and are approved of by them for good pewter, and that they have put their mark and number upon them; for which mark a stamp shall be forthwith prepared at the town charge: For which certificate and every assay made* by them, they shall be allowed by the distiller or owner of such heads and worms, the sum of *one dollar*. The said certificate, with mark and number to be entered in the Town Clerk's book, for which service the Town Clerk shall be allowed ten cents.

Assay Masters may enter still houses, &c. to examine.

[Ib. § 4.]

Certificate to be produced of Assay Masters.

Fees for certificate & assay.

[*118]


Certificate to be entered with Town Clerk.

SECT. 5. *Be it further enacted*, That all forfeitures and penalties arising by virtue of this act, shall be ~~the one half~~ to the poor of the town, where the offence is committed, and the other half to him or them, that shall inform and sue for the same. And further, that all Assay Masters, chosen to that office, shall make oath as follows, viz. I, A. B. do solemnly swear that I will, to the best of my skill, prove and

Penalties, how recovered and appropriated.

[Ib. § 5.]

Assaymaster's oath.

- CH. 30.  make trial of all worms and still heads, within the town of C. that are used, or designed to be made use of, in distilling, that shall come to my knowledge, for which there is no certificate in the Town Clerk's book, and will make a true and faithful report thereof to the Town Clerk, for the time being. So help me God. [Approved March 15, 1821.]

Chapter 30.

AN ACT relating to the punishment of Convicts. (a)

Sentence of imprisonment to be executed in county gaol.

[abolished; See ch. 368, Vol. 8, p. 221.]

[Mass. Stat. Feb. 19, 1819, § 1.]

Gaoler directed.

Treatment of convicts in solitary confinement.

[119]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That whenever any person convicted of any crime or offence whatever, shall be duly sentenced therefor to solitary† imprisonment and confinement to hard labour by any Court of this State or of the United States, the Court before whom such conviction shall be had, may order the sentence to be executed in the common gaol or house of correction of the County in which the offence shall have been committed. And the keeper of such gaol or house of correction is hereby authorized and required to execute such sentence of solitary imprisonment, by confining the convict in one of the cells of the gaols or house of correction, if any such there be, and if there be none, then in the most retired and solitary part of the prison or house of correction; and during the time of such solitary confinement, the convict shall be fed on bread and water only, unless* other food shall be necessary for the preservation of his or her life; and no intercourse shall be allowed with such convict, except for the conveyance of food or other necessary purposes.

SECT. 2. *Be it further enacted,* That the keeper of the gaol or house of correction, to which such convict shall be

(a) See "An act to provide for the erection and government of a State Prison," ch. 226, Vol. 3, p. 58; Also "An Act providing for the government of the State Prison, and for the punishment of convicts," ch. 282, Vol. 3, p. 110.

committed, after the term of solitary imprisonment, shall furnish the convict with tools and materials to work with, in any suitable manner in which his or her time can be usefully and profitably employed, either in the gaol or house of correction, or within the close yard thereof in the day time ; and such convict, when set to work in the yard, shall be confined with a log and chain, or in such other manner, as shall prevent his or her escape, without unnecessarily producing bodily pain, or interrupting his or her labour. And it shall be the duty of the Sheriff in each county to oversee the execution of all such sentences, and to make such rules and regulations, from time to time, as may best effect the purposes of this act, and to cause the same to be duly executed ; and all such rules and regulations shall be reported to the Court of Sessions of the county within which the gaol or house of correction is situated, and they may be altered or repealed by said Court, as they shall see fit. And it shall be the duty of the keeper of such gaol or house of correction, to report to the said Court at every session thereof within his county, the names and condition of all such convicts in the gaol or house of correction, and the manner in which they are treated and employed. And if any convict during the time for which he or she is sentenced to hard labour, shall refuse or neglect, without any reasonable excuse therefor to labour as aforesaid, when tools and materials for that purpose are furnished, such convict so long as he or she shall so refuse, shall be kept on bread and water, and be confined to solitary imprisonment in the manner provided in the first section of this act.

SECT. 3. *Be it further enacted,* That the keeper of every gaol or house of correction, to which any such convicts shall be committed, shall cause to be kept a true account of the labour of every such convict, and of the articles manufactured or produced by each, and all other proceeds of his or her* labour ; and also of the cost of the materials furnished to each convict, and of all other charges and expenses attending the execution of this act ; and he shall also cause the articles manufactured by each convict or other produce of his or her labour to be sold, and like account of the pro-

CH. 30.

Gaoler to furnish tools, &c.

[Ib. § 2.]

Convicts to wear log and chain in certain cases.

Duty of sheriff.

Rules of gaol to be submitted to court of sessions.

Gaoler to report.

Refractory convicts to be punished.

Gaoler to keep an account of the proceeds of labour.

[Ib. § 3.]

[120]

And report the sums to the court of sessions.

CH. 30. ceeds of such sales to be kept ; all which accounts, from time to time, shall be reported and presented to said Court in the county, in which the gaol or house of correction is situated. And at the expiration of the term for which any such convict shall have been sentenced, if it shall appear

If proceeds of labour exceed the cost of materials and expenses,

balance to be paid the convict,

or to his family.

Charge of convicts to be paid by the State.

Courts may order funds to be advanced for materials,

[121]

that the proceeds of his or her labour have been more than sufficient to pay for the cost of the materials, with which he or she may have been furnished, and for his or her maintenance in the gaol or house of correction, and for all other charges and expenses incurred in keeping such convict confined and employed in manner aforesaid, the residue of such proceeds shall be paid over to such convict for his or her own use : *Provided*, That said Court if it see fit, at any time during the confinement of such convict, when it shall appear that the proceeds of his or her labour are more than sufficient for the purposes aforesaid, may order the residue of said proceeds or any part thereof to be paid over to the use of the family of such convict, if any he or she have ; and in such case the balance only of such proceeds, if any remain at the time of the discharge of such convict, shall be paid to him or her in manner aforesaid. And all charges and expenses incurred in maintaining such convicts, and keeping them employed, excepting such as may be reimbursed by the proceeds of their labour, shall be paid by the State. And the accounts of the gaoler or keeper of the house of correction in that behalf being first settled by the Court aforesaid in the counties respectively, in which the gaol or house of correction is situated, the said Courts respectively are hereby authorized to order such sums, as may, from time to time, be necessary to enable the gaoler or keeper of the house of correction to provide such tools and materials as aforesaid to be advanced and paid to him out of the Treasury of the county in which the gaol or house of correction may be situated, such gaoler or keeper of the house* of correction to be accountable in manner abovementioned for the expenditure of the same, and to repay the amount thereof into the said county treasury out of the proceeds of the labour of such convicts, or out of the monies received by him in that behalf from the treasury of the State.

SECT. 4. *Be it further enacted*, That if any such convict shall be unruly or shall disobey any of the regulations established as aforesaid, for the government of the convicts in the gaol or house of correction, to which he or she is committed, it shall be lawful for the Sheriff of the county in which the gaol or house of correction may be, after due inquiry into the circumstances of the case, to order such unruly or disorderly convict to be kept in solitary imprisonment and to be fed on bread and water only, in the manner provided in the first section of this act, for a term not exceeding ten days, for every such offence. And it shall be the duty of the gaoler or keeper of the house of correction to furnish every such convict, who may be capable and willing to read, with a copy of the Bible and with such moral and religious tracts, as may be suited to their condition, when he can procure the same from any Bible Society or from other well disposed persons ; and also to permit any Minister of the Gospel, who may be disposed to aid in the reformation of such convicts and to instruct them in their moral and religious duties, to have access to them when in solitary imprisonment, and at all other times, when not employed in labour according to the provisions of this act.

CH. 30.

Refractory convicts may be punished.

[Ib. § 4.]

Convicts may be furnished with the bible, &c.

And ministers may have access to them.

SECT. 5. [Repealed: See next chapter.

It provided that gaols thereafter erected, should have cells and work-yards; and that Courts of Sessions should order them erected to gaols already built.]

*SECT. 6. [Repealed: See next chapter.

[*122]

It provided, that where there is no suitable gaol for the imprisonment of a convict in the county where the conviction takes place, sentence may be executed in an adjoining county.]

SECT. 7. *Be it further enacted*, That an act relating to the punishment of convicts, who may be sentenced to solitary imprisonment and confinement to hard labour, adopted by the Constitution of this State, be and the same is hereby repealed. [Approved June 27, 1820.]

Repeal of former act.

CH. 31.

Chapter 31.

Repeals two
sections of for-
mer act.

AN ACT repealing part of an Act relating to the punishment of Convicts.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That the fifth and sixth sections of an act entitled, "An Act relating to the punishment of convicts," passed on the twenty-seventh day of June last, be, and the same are hereby repealed.

[*123]
Regulations
respecting soli-
tary imprison-
ment.

[†See next
preceding ch.]

SECT. 2. *Be it further enacted,* That until more suitable and permanent provision respecting prisons can be made, in* case of any conviction, on which the convict shall be punished by solitary imprisonment and confinement to hard labour, the Court before whom such conviction may be had, shall order such punishment to be by solitary† imprisonment so far as the situation of the prison, the state of the convict, and the circumstances and aggravation of the offence shall render proper. [Approved March 19, 1821.]

Chapter 32.

AN ACT respecting Conditional Pardons.

WHEREAS in the course of human events it sometimes happens that crimes for which the perpetrators are legally sentenced to suffer the punishment of death, are attended with alleviating circumstances :

Governor with
advice of
Council may
grant condi-
tional pardons.

[Mass. Stat.
Mar. 6, 1804.]

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That whenever any person, who has been, or shall hereafter be sentenced by the Justices of the Supreme Judicial Court, to suffer the punishment of death, shall make application to the Governor for pardon, and the Governor shall think proper, by and with the advice and consent of the Council, to grant such pardon, on condition that the person thus sentenced be imprisoned or confined to hard labour during his or her natural life, or for a certain term of years, in the condition of such pardon to be expressed, the Governor be, and hereby is authorized in order to carry the same into effect, to issue his warrant or warrants, directed to all proper officers ; and the said offi-

cers shall be holden to serve, execute and obey the same, CH. 33.
 in the same manner as if such imprisonment or confinement
 had been the punishment awarded in the original sentence.
 [Approved February 28, 1821.]

Chapter 33.

AN ACT to prevent and punish Trespasses.

SECT. 1. **BE** it enacted by the Senate and House of Description of
trespasses—
Representatives, in Legislature assembled, That if any per-
 son shall cut down, destroy or carry away any tree or trees
 whatever,* placed or growing for use, shade or ornament ; or [*124]
 any timber, wood or underwood, standing, lying or growing
 on land not his own ; not having the consent (a) of the owner [Mass. Stat.
Nov. 23, 1784,
§ 1.]
 thereof ; or shall throw down or open any bars or gates,
 fence or fences, and leave the same down or open ; or shall
 injure, mar or deface any fence or fences, belonging to, or
 enclosing lands not his own ; or shall dig up or carry away
 any stones, ore, gravel, clay, sand, turf or mould, roots, fruit,
 or plants ; or cut down or carry away any sedge, grass,
 hay or corn, wherein he hath no interest, standing, lying
 or being on any land not his own ; or shall take or carry
 away from any wharf or landing place, whereof he is not a
 proprietor or owner, any goods whatever, wherein he hath Penalty for
committing—
 no interest, without the leave of some person who has in-
 terest therein ; or shall break the glass, or any part of it,
 in any building not his own ; the person so offending, shall
 forfeit and pay for each tree or stick of timber so cut down,
 destroyed or carried away ; and for each and every other liable also in
damages to
party injured.
 offence, a fine not less than one dollar, nor more than seven
 dollars, to the use of the State, to be recovered on com-

(a) 1. In a complaint against one under this provision, it is material to allege that the cutting was without the consent of the owner. *Hall's case, 5 Gif. 409.*

2. See "an Act giving further remedy in cases of wilful trespass," passed February 14, 1838.

CH. 33. *plaint (b) before any Justice of the Peace in the county where the offence shall be committed, and shall be liable to answer in damages to the party injured : Provided, That nothing in this act shall be construed, to prohibit the surveyors of highways from taking stones and gravel from uninclosed lands for the repairing of the highways.*

Penalty for destroying mile stones or monuments.

[Ib. § 2.]

SECT. 2. *Be it further enacted, That if any person shall wilfully break, deface or destroy any mile stone or public monument, unless properly authorized so to do, the person so offending shall forfeit and pay for each offence, a fine not less than seven dollars, nor more than fifty dollars to the use aforesaid, to be recovered on indictment before the Circuit Court of Common Pleas in the county where the offence shall be committed, and be further liable to answer in damages as aforesaid.*

Penalty for committing above offences secretly, by night, or in disguise.

[Ib. § 3.]

SECT. 3. *Be it further enacted, That any person who shall commit any of the offences abovementioned, secretly, in the night time, or in disguise, shall forfeit and pay a fine to the use of the State, not less than ten dollars, nor more than sixty dollars for each offence, to be recovered on indictment.*

[*125]
Counties, towns and parishes may sue for damage done to their buildings or property.

[Ib. § 4.]

SECT. 4*. *Be it further enacted, That when any trespasses shall be committed on any buildings or enclosures belonging to any county, town or parish, the county, town and parish Treasurer, for the time being, shall be and hereby are severally authorized to sue for the damage done to the public building or enclosures of their county town or parish respectively ; and where any public buildings are owned partly by the town and partly by the county, in that case the county or town Treasurer, whoever may first institute an action, may prosecute for damages thus sustained. And where any public building is owned by any school district, the town Treasurer may sue therefor in manner aforesaid.*

Penalty for entering on another's grass land, orchard, &c. without leave, to destroy fruits, grass, &c.

SECT. 5. *Be it further enacted, That if any person shall enter upon any grass land, orchard or garden without permission from the owner thereof, with intent to cut, destroy, take or carry away, any grass, hay, fruit or vegetables, with intent to injure or defraud such owner, each person so offending*

shall forfeit and pay, for every such offence a sum not less than two dollars, nor more than ten dollars to the use of the State, to be recovered on complaint before any Justice of the Peace of the County in which the offence shall be committed; and the persons so offending shall also be liable in damages to the party injured.

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[Mass. Stat.
June 12, 1818,
§ 1.]
how recovered.

SECT. 6. *Be it further enacted*, That if any person having entered upon any grass land, orchard or garden, shall take therefrom, without permission of the owner thereof, and with the intent to injure and defraud such owner, any grass, hay, fruit, vegetable or shrub, cultivated thereon for ornament or use, such person so offending shall forfeit and pay for each offence, to the use of the State, a sum not less than five, nor more than fifty dollars, to be recovered by indictment or information before the Circuit Court of Common Pleas, in the county where such offence shall be committed, and the person so offending, shall be also liable to the party injured, in a sum equal to three times the value of such grass, hay, fruit, vegetable or shrub, to be recovered by action of the case in any Court of competent jurisdiction (c).

Penalty for a person carrying away from any orchard or grass land, without leave of owner, any grass, fruit, &c.

[Ib. § 2.]

liable also to damages.

SECT. 7. *Be it further enacted*, That any person, who having entered upon any grass land, field or orchard shall, without permission of the owner thereof, and with the intent to* injure him, break, bruise, cut, mutilate (d), injure or destroy, any fruit tree, tree for ornament or shade, or shrub cultivated thereon, for ornament or use, and which shall be standing or growing thereon, such person so offending, shall forfeit and pay to the use of the State, a sum not less than ten dollars, nor more than one hundred dollars, to be recovered by indictment or information, in manner as is provided in the second section of this act.

Penalty for cutting or mutilating fruit, or ornamental, or shade trees.

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[Ib. § 3.]

how recovered.

SECT. 8. *Be it further enacted*, That if any person shall commit any of the trespasses mentioned in this act, on the Lord's day or in the night time, that is to say, between sun-

Penalty for committing such wrongs on Lord's day or by night.

(c) *Little vs. Conant & al.* 2 Pick. 527.

(d) The offence of cutting and girdling fruit trees is not punishable by indictment at common law; but only by the Statute. *Brown's case*, 3 Glf. 177.

CH. 34. setting and sunrising, he shall be liable to double the penalties and forfeitures, the same to be prosecuted for, and recovered in manner as before provided ; and all prosecutions for breaches of this act, shall be commenced within one year from the time the offence shall be committed, or the penalties or forfeitures shall have accrued, and not afterwards. [Approved March 19, 1821.]

[Ib. § 4.]

Limitation of prosecutions.

Additional Act, ch. 312, Vol. 3, p. 156.

Chapter 34.

AN ACT to prevent the waste and destruction of Timber and Cord Wood.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That any person seized of a freehold estate, or of a remainder or reversion in fee simple, or fee tail, in a lot or tract of wood land or timber land in this State, whereon the trees shall have come to an age and growth fit to be cut, may prefer a petition to the Supreme Judicial Court, holden in any county, representing the state and condition of such trees, and praying that the same may be felled and sold (a), and the proceeds thereof invested for the use of the persons interested in such wood land ; and the said Court may thereupon order due notice to be given to all persons known to be interested therein, to appear and show cause, if any they have, why the prayer of such petition should not be granted ; and after hearing the parties, if any shall appear, may appoint one or more persons to examine said wood land, or timber land, and if from* their report, or other evidence which shall be exhibited to the Court, it shall appear that the trees upon said land are of an age and growth fit to be cut, and likely to deteriorate in value, the said Court may, and they are hereby empowered to license and order, on such terms and conditions as said Court shall require, the whole, or such part of such trees, as they

Persons seized of freehold estate or remainder or reversion in fee simple or fee tail, may apply to Supreme Judicial Court for leave to cut timber and cord wood.

[Mass. Stat. Feb. 18, 1819, § 1.]

Notice to be ordered.

Court may appoint persons to examine & report.

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And may, if thought proper, grant leave on such terms as they may direct.

(a) See "An Act authorising the sale of trees and timber standing upon the lands of minors," passed March 2, 1833.

shall think proper, to be felled and sold, and the money arising from the sale thereof to be brought into Court subject to their further order.

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SECT. 2. *Be it further enacted*, That the said Court shall and may appoint one or more commissioners, whose duty it shall be to superintend and direct, the felling of said trees, and the sale of the same, and to account to said Court for the proceeds thereof, and also to give bond to the Clerk of said Court, or such other person as the Justices of said Court shall appoint, for the faithful performance of the trust. And the said Court may, and they are hereby further empowered, to cause the net proceeds of said trees after paying all necessary expenses and charges, to be invested in other real estate in this State, or in public stocks, at their discretion, to be holden to the same uses and subject to the same limitations as such wood land or timber land; and the income and profits thereof, to be paid to the person or persons entitled to the income and profits of said wood land or timber land, or to be paid and apportioned to and among the several persons interested in the same estate, in such portions as to the said Court shall appear just and equitable; and also to appoint one or more Trustees to take and hold such estate or stock for the uses aforesaid; and such Trustees to remove and others appoint in their stead, when and so often as the security and good management of the property shall require it: which Trustees shall also give bond, with good and sufficient sureties, to said Clerk or other person, as aforesaid, for the faithful execution and performance of the said trust. [Approved February 28, 1821.]

Court to appoint Commissioners to superintend the cutting and felling the trees and account for proceeds.

[Ib. § 2.]

Proceeds may be invested in other lands, stocks, &c.

Income to be paid among persons interested.

Court may appoint trustees to take and hold stocks, &c.

Trustees to give bond.

Chapter 35.*

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AN ACT to prevent Tenants in common, Joint Tenants and Coparceners, from committing waste, and for other purposes.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That all gifts,

CH. 35. grants (a), feoffments, devises and other conveyances of any lands, tenements and hereditaments, which have (b) been or shall be made to two or more persons, whether for years, for life, in tail or in fee, shall be taken deemed and adjudged to be estates in common and not in joint tenancy, unless it has been or shall be therein said that the grantees, feoffees or devisees, shall have or hold the same lands, tenements or hereditaments jointly, or as joint tenants (c), or in joint tenancy, or to them and the survivor or survivors of them, or unless other words be therein used, clearly and manifestly showing it to be the intention of the parties to such gifts, grants, feoff-

Grants, devises, &c. of lands, to two or more to be estates in common and not joint tenancy.

[Mass. Stat. Mar. 9, 1786, § 4.]

unless clearly expressed or designed to be otherwise.

(a) A conveyance to husband and wife in fee, creates a joint-tenancy, notwithstanding the provisions of § 1. *Shaw & als. vs. Hearsey & al.* 5 Mass. 521; *Fox vs. Fletcher*, 8 Mass. 274.

2. So does a mortgage to two, to secure a joint debt. *Appleton vs. Boyd*, 7 Mass. 131.

3. Where one devised lands to his son, and his daughter, and two grandsons, (surviving children of a deceased daughter) to be divided between them into three parts—one third to the son, one third to the daughter, and the other third to the two grandsons; and devised other portions to other children in full of their share of his estate; and charged the devisees of the first three parts with the payment of his debts, in equal thirds; and one of the grandsons died in the life time of the testator, unmarried; it was held that the devise to him did not lapse, but survived to his brother. *Anderson vs. Parsons & als.* 4 Glf. 486.

4. Grants to two or more persons by the Legislature, are to be construed as conveying estates in common, unless a different tenure be expressed in the grant. *Higbee & als. vs. Rice*, 5 Mass. 344.

(b) 1. This provision does not militate with the constitution, as a retrospective law. *Miller vs. Miller*, 16 Mass. 59.

2. There seems to be no constitutional objection to the power of the Legislature to alter a tenure by substituting another tenure more beneficial to all the tenants. *Holbrook vs. Finney*, 4 Mass. 568. See *Annable vs. Patch & al.* 3 Pick. 362.

(c) 1. One joint tenant cannot convey a part of the land, by metes and bounds, to a stranger. *Porter vs. Hill*, 9 Mass. 35.

2. But such a conveyance has been held to be valid and effectual against the grantor and all claiming under him. *Varnum vs. Abbot & al.* 12 Mass. 477; *Bartlett vs. Harlow*, ib. 348; *Baldwin vs. Whitney & al.* 13 Mass. 57.

3. One tenant in common may make a valid lease for a year of a specific portion of the common property; but if by parole, it gives an estate at will only. *Rising & als. vs. Stannard*, 17 Mass. 282.

ments, devises, or other conveyances, that such lands, tenements and hereditaments should vest, and be held as joint estates and not as estates in common : *Provided nevertheless*, Where any estate has already vested in the survivor or survivors, upon the principle of joint tenancy, it shall be held in like manner as it would have been held, if this act had never been passed ; any thing therein to the contrary notwithstanding.

CH. 35.

Proviso, as to estates already vested.

SECT. 2. *Be it further enacted*, That if any person holding any lands in common and undivided, shall cut down, destroy or carry away any trees, timber, wood or underwood whatsoever, standing or lying on such lands, or shall dig up or carry off any stone or ore, or any other valuable matter or make any other strip or waste thereon, without first giving notice in writing under his or their hands, unto all the persons interested therein, or to their agents, factors or attornies, forty days beforehand, setting forth that he or they have occasion for, and shall enter upon and improve such lot or lots of lands lying in common as aforesaid, he shall forfeit and pay treble damages, to be recovered by any one or more of the persons interested in the same lands, who may prosecute and sue for the same, in an action of trespass in his or their own names, as well on the behalf of the other* co-tenants, except the defendant, without being held to name them in the writ, as of him or themselves, one moiety of the aforesaid penalties to be for the use of such person or persons who shall sue for the same, and the other to and for the use of all the co-tenants excepting the defendant, in proportion to their respective interest, in the land where the trespass hath been committed.

No tenant in common to cut or carry away timber, &c. from the land, without giving notice in writing to all the co-tenants, 40 days previous.

Penalty for so doing, and how to be recovered and appropriated.

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SECT. 3. *Be it further enacted*, That when any writ of partition (d) shall be brought and served at the suit of any one or more persons so interested in any lot or lots of land, tenements, or hereditaments, or a petition shall be pending in

While writ or petition for partition is pending, no person interested in com-

(d) 1. Tenants in common may join or sever in petition for partition, writs of entry, or of right, and the decease of one of them, pending the process, shall not abate it. See ch. 347, § 7, Vol. 3, p. 195.

2. A tenant in common may be considered as sole owner for purposes of taxation. See ch. 337, § 4, Vol. 3, p. 182.

CH. 36. Court for a partition of the same, no person or persons having a right or interest in any such lands, tenements or hereditaments, or holding any part or share of the same in common as aforesaid, while such suit or petition is depending, shall or may cut down, destroy or carry away any trees, timber, wood or underwood, stone or ore, or other valuable matter whatsoever, standing, growing or lying on, or belonging to such lands, or shall otherwise hurt or damage any such lands, tenements or hereditaments, until partition can be made of the same according to law ; on pain that the person or persons so offending shall incur the like forfeitures, to be recovered in like manner and for such uses as are before mentioned and declared.

mon in the
lands, &c.
shall cut or de-
stroy timber,
&c. &c.

[Ib. § 2.]

Penalty for so
doing.

Penalty for de-
fendant's mak-
ing strip or
waste while a
real action is
pending a-
gainst him ;

[Mass. Stat.]
Feb. 27, 1796,
§ 2.]

how recovered.

SECT. 4. *Be it further enacted,* That if any person or persons shall commence and prosecute any action of ejectment, or other real action, for recovering possession of any lands and real estate, unjustly withheld from him or them by any person, and such person in possession or any other persons pending such action, and after the service of the writ therein, shall make strip or waste by cutting, felling or destroying the wood, timber, trees or poles standing or growing on such land sued for ; he or they making such strip or waste, shall for every such offence forfeit and pay to the party aggrieved treble damages (e), to be recovered by action in any Court proper to try the same, after the plaintiff or defendant has recovered his title and possession of such estate sued for. [Approved March 15, 1821.]

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Chapter 36.*

AN ACT directing the mode of transferring Real Estates by Deed.

All deeds, &c.
to be signed,
sealed, ac-

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That all deeds or

(e) Trespass is the most acceptable action for such damages. *Pierce vs. Spring & als.* 15 Mass. 489.

other (a) conveyances of any lands, tenements or hereditaments, lying within this State, signed and sealed by the party granting the same, having good and lawful right or authority thereunto, and acknowledged (b) by such grantor or grantors, before a Justice of the Peace in this State, or before a Justice of the Peace or magistrate in some other of the United States of America, (or in any other State or Kingdom wherein the grantor or vendor may reside at the time of making and executing the deed,) and recorded (c) at length in the

CH. 36.

known by
the grantor
and recorded.

[Mass. Stat.
Mar. 10, 1784,
§ 4.]

(a) 1. The assignment of a mortgage must be made by deed, under the provisions of this statute. *Vose vs. Handy*, 2 Glf. 322.

2. A deed is not to be limited, restrained, or enlarged, by any parol declarations of the parties. *Kimball vs. Morrill*, 4 Glf. 368.

(b) 1. Where a deed is executed by husband and wife, an acknowledgment by the husband is sufficient to entitle it to be recorded. *Catlin vs. Ware*, 9 Mass. 218.

2. A deed of the life estate of a wife to him in remainder, so acknowledged and recorded, was held sufficient. *Dudley vs. Sumner*, 5 Mass. 438.

(c) 1. The intention of this statute was to provide a substitute for a feoffment with livery of seizin. The livery of seizin is made to give notoriety to the alienation. This purpose is better effected by the registry. *Wells vs. Prince*, 4 Mass. 68.

2. If a second purchaser has notice of the first conveyance, the intent of the statute is answered, and his purchase afterwards is a fraudulent act. The notice may be express or implied. *Norcross vs. Widgery*, 2 Mass. 508; *Farnsworth vs. Childs*, 4 Mass. 637; *Prescott vs. Heard*, 10 Mass. 62; *Priest vs. Rice*, 1 Pick. 164.

3. But if such second purchaser procures his deed to be recorded before the first, and then sells the land *bona fide*, and for a valuable consideration, to a person ignorant of the circumstances, the latter will hold the land against the first purchaser; and this whether the conveyances be conditional by way of pledge, or absolute. *Connecticut vs. Bradish*, 14 Mass. 296.

4. In cases of implied notice of a conveyance not recorded, the facts must be of such a nature as to leave no reasonable doubt of the existence of the conveyance. *Lawrence & al. vs. Tucker*, 7 Glf. 195. See *Shaw & al. vs. Poor*, 6 Pick. 86.

5. Though an attorney of record may have had knowledge of a prior conveyance of the land attached in the suit in which he is retained, it will not affect the attachment, if his client had no such knowledge. *Ib.*

6. When a *bona fide* purchaser enters under his deed, and continues an open possession of it, a second purchaser cannot avail himself of the first purchaser's neglect to register his deed. *Davis vs. Blunt*, 6 Mass. 487.

CH. 36. registry of deeds in the county where such lands, tenements, or hereditaments lie, shall be valid to pass the same without any other act or ceremony in the law whatsoever (*d*). And no bargain, sale, mortgage or other conveyance in fee simple, feetail, or for term of life, or any lease (*e*) for more than seven years from the making thereof, of any lands, tenements, or hereditaments, within this State, shall be good and effectual

No conveyance, &c. or lease for more than seven years shall be good against any but grantor and his heirs unless so ac-

7. When a prior conveyance, not recorded until after one of a subsequent date, is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved. *Norcross vs. Widgery*, 2 *Mass.* 509. See also, "supplement," 3 *Mass.* 578.

8. By a conveyance of land in fee, the estate passes presently to the grantee, and does not remain in the grantor until the deed be acknowledged and recorded. *Marshall vs. Fisk*, 6 *Mass.* 24.

9. The cancelling of such a deed by the grantor, with the consent of the grantee, and a second conveyance to a third person having knowledge of the previous conveyance, is good to pass the estate to such third person. *Com. vs. Dudley*, 10 *Mass.* 403.

10. But such proceedings shall not defeat an intermediate attachment made by a creditor of the first grantee. *Marshall vs. Fisk*, 6 *Mass.* 24.

11. *Aliter*, where the attachment was subsequent to the second conveyance. *Holbrook vs. Tirrell*, 9 *Pick.* 105.

12. A conveyance when recorded relates back to the time of its execution, against all persons except a subsequent purchaser of the grantor without notice. *Pray vs. Pierce*, 7 *Mass.* 381.

13. A deed of conveyance acknowledged and recorded, if obtained by duress, may be avoided by the entry of the grantor or his heirs within twenty years. *Worcester vs. Eaton*, 13 *Mass.* 371.

14. But, where A. conveyed land to B. and before the deed was recorded, the bargain was rescinded, and the deed returned to A., B. afterwards obtained the deed by fraud, caused it to be recorded, and then mortgaged; the title of the mortgagee was maintained against A. *Dana vs. Newhall & al.* 13 *Mass.* 498.

(*d*) 1. Yet a deed, signed, sealed and recorded, without being delivered to the grantor, was held inoperative. *Maynard vs. Maynard & als.* 10 *Mass.* 456.

2. A deed so executed will be void, unless the grantee assent to it. *Harrison & al. vs. Phillip's Academy*, 12 *Mass.* 461.

(*e*) Though the lease be for less than seven years, yet being made to commence at a future day, if it is to endure for more than seven years from the time of making it, it is within the meaning of this statute and should be recorded. *Chapman vs. Gay*, 15 *Mass.* 444.

in law to hold such lands, tenements or hereditaments, against any other person or persons, but the grantor or grantors, and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in manner aforesaid : *Provided nevertheless*, That when any grantor or lessor as aforesaid shall go beyond sea, or be removed out of this government, or be dead, before the deed or conveyance by him executed, shall be acknowledged as aforesaid, in every such case the proof of such deed or conveyance, made by the oath of one or more of the witnesses, whose names may be thereunto subscribed, before any Court of record within this State ; or in case one or all of such witnesses have also deceased, that the proof of the signature of such grantor or grantors, and of such subscribing witness or witnesses, made by the oath of two witnesses before any Court of record, within this State, shall be equivalent to the party's own acknowledgement thereof before a Justice of the Peace as aforesaid.

CH. 36.

known & recorded.

Mode of proving deed when grantor is dead or out of State, &c.

Mode of proving when witnesses are also dead.

[Mass. Stat. June 28, 1787.]

SECT. 2*. *Be it further enacted*, That if any grantor or lessor of any lands, tenements or hereditaments, shall refuse to acknowledge any deed or other conveyance as aforesaid, it shall be lawful for such grantee or lessee to leave a copy of such deed or lease, compared with the original by the Register, in the Register's office, and such copy so left shall be deemed sufficient caution to all persons against purchasing or extending execution thereon for the space of forty days from the time of leaving such copy. And any Justice of the Peace in the same county, after such refusal, at the request of the grantee or lessee, his heirs, executors, administrators or assigns, may issue a summons for such grantor or lessor to appear (if he see cause) at a certain time and place therein mentioned, to hear the testimony of the subscribing witnesses thereunto ; which summons shall be served by the proper officer, seven days at the least before the time therein assigned for proving the deed ; and at such time and place, whether the grantor or lessor be present or not, it being made to appear by the oath of one or more of the witnesses thereunto subscribed, that they saw the said grantor (or lessor) voluntarily sign and seal the deed, and that they subscribed their

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Proceedings when grantor refuses to acknowledge a deed.

[Mass. Stat. Mar. 10, 1784, § 5.]

CH. 36. names as witnesses thereunto at the same time, such proceedings, and a certificate thereof, under the hand of the Justice, annexed to the deed (wherein the presence or absence of the adverse party shall be noted,) shall be equivalent to the acknowledgment of the grantor before a Justice of the Peace : *Provided*, That nothing in this act shall be construed to bar any widow of any vendor or mortgagor of lands, or tenements, from her dower (*f*) or right in, or to such lands or tenements, who did not join with her husband in such sale or mortgage, or otherwise lawfully bar, or exclude herself from such dower or right.

Proviso as to widow's dower.

No estate in fee, &c. to be defeated by bond of defeasance as to any but original party thereto, unless recorded.

[Mass. Stat. June 23, 1902.]

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SECT. 3. *Be it further enacted*, That no title or estate in fee simple, fee tail, for term of life, or any lease for more than seven years from the making thereof, of any lands, tenements, or hereditaments within this State, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance (*g*), in the hands or possession of any person, but the original party to such bond, deed, or other instrument, or his heirs, unless such bond, deed, or other instrument of defeasance* be recorded at large in the Registry of Deeds,

(*f*) 1. A wife may bar herself of dower, by joining her husband in a deed of conveyance, relinquishing her claim to dower, and putting her seal to the deed. *Fowler vs. Shearer*, 7 Mass. 14.

2. Or she may do it by her separate deed, subsequent to and in consideration of her husband's sale. *Ib.*

3. Where the wife joined the husband in a mortgage, relinquishing her claim of dower, and after the death of the mortgagor the purchaser of the equity of redemption paid the mortgage, and the mortgagee acknowledged the discharge on the record, it was held that the widow of the mortgagor was barred of her dower. *Popkin vs. Barnstead*, 8 Mass. 491.

4. If the wife affixed her signature and seal to the husband's deed, her name not being mentioned otherwise in the deed, she is not thereby barred of her dower. *Catlin vs. Ware*, 9 Mass. 218 ; *Lufkin vs. Curtiss*, 13 Mass. 223.

5. Respecting dower, see onward, ch. 40, and notes thereto.

(*g*) 1. What shall be deemed an instrument of defeasance must still be determined upon the principles of the common law. *Kelleran vs. Brown*, 4 Mass. 445.

2. A writing without seal cannot operate as a defeasance of a deed under seal. *Ib.*

3. *Newhall vs. Pierce & al.* 5 Pick. 450.

in which the original deed referred to in the said bond, deed, CH. 36.
or other instrument of defeasance, shall have been recorded. ~~~~~

SECT. 4. *Be it further enacted*, That it shall be lawful for any person or persons, who shall be seized and possessed (h) of any lands, tenements, or hereditaments within this State, in fee tail, being of full age, by deed duly executed before two or more credible subscribing witnesses, acknowledged before the Supreme Judicial Court in any county, or the Circuit Court of Common Pleas in the county where such lands lie, or before any Justice of the Peace in this State, or before a Justice of the Peace or Magistrate in some other of the United States of America, or in any other State or Kingdom wherein the grantor or vender may reside at the time of making and executing the deed, and recorded in the record of deed for such county, for a good (i) or valuable consideration, *bona fide*, to give, grant, sell and convey such lands, tenements, or hereditaments, or any part thereof in fee simple, to any person or persons capable by law, of taking and holding real estates, in this State; and such deed so executed, acknowledged and recorded, shall be sufficient and effectual in law, to bar all estates tail in such lands, tenements or hereditaments; and all right and title of the tenant or tenants in tail, and their issue in tail, and of all others claiming under, and by force of the original gift or grant which created such estate tail in and to such lands, tene-

Tenant in tail may convey in fee by deed signed before two witnesses acknowledged and recorded;

[Mass. Stat. Mar. 8, 1792, § 1.]

legal effect of such conveyance.


(h) 1. The words "seized and possessed" refer to an estate tail in possession, as distinguished from one in expectancy. *Lithgow vs. Kavanagh*, 9 Mass. 178.

2. The guardian of a person *non compos* may, on being duly licensed therefor, lawfully sell in fee simple the estate tail of his ward, during his life, for the payment of his debts, and by such sale the estate tail is extinguished, and the remainders barred. *Williams & als. vs. Hichborn & als.* 4 Mass. 189.

(i) 1. Such conveyance may be for a good, as well as for a valuable consideration. *Wheelwright & al. vs. Wheelwright*, 2 Mass. 449.

2. It is not sufficient if such deed purports to be so made, if the fact be otherwise. *Soule vs. Soule & als.* 5 Mass. 61.

3. As between the purchaser and seller, the consideration in such case is a "valuable consideration," even if inadequate compared with any supposed estimate of the premises. *Lithgow vs. Kavanagh*, 9 Mass. 178.

CH. 36.  ments or hereditaments, and all reversions and remainders, expectant upon the determinations of such estates tail, and to pass, and to vest the absolute inheritance in fee simple of such lands, tenements or hereditaments, in such purchasers or grantees, without any fine or common recovery, made or suffered, or any other act or ceremony whatever, any law, custom or usage to the contrary notwithstanding.

Effect of such conveyance by tenant of the freehold and remainder man

[Mass. Stat. Feb. 18, 1905.]

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if executed as before mentioned.

All lands in fee tail liable to debts of tenant, &c.

[Mass. Stat. Mar. 8, 1792, § 2.]

SECT. 5. *Be it further enacted*, That in all cases whatever, where an estate tail in remainder in lands and tenements, together with all remainders and reversions expectant on the determination thereof, might by law be barred by a common recovery, duly suffered, by the tenant of the freehold and remainder man joining therein, such estate tail, with all such remainders and reversions expectant on the determination* thereof, shall be as effectually barred, to all intents and purposes, by the deed or deeds of the tenant of the freehold and of the remainder man, as the same could be barred by the suffering such common recovery; and the person or persons, to whom such deed or deeds shall be so made shall hold the lands and tenements so conveyed, to such uses as may be therein expressed, in the same manner as though such uses had been so expressed in the deeds made, declaring the uses for which such common recovery might have been suffered: *Provided*, That such deed or deeds made for the purposes aforesaid, be duly executed, acknowledged and recorded as provided in this act.

SECT. 6. *Be it further enacted*, That all lands, tenements or hereditaments, in this State held, or that may be held in fee tail, general or special, shall be and are hereby declared to be liable and subject to the payment of the debts of the tenant in tail (j), in the same way and manner as other real estates are liable and subject, as well after the decease, as in the life time of such tenant in tail.

SECT. 7. *Be it further enacted*, That all pews (k) and

(j) See note (h) 2, to this chapter.

(k) 1. It is not necessary for the officer to enter a meeting house to attach a pew therein. *Perrin vs. Leverett*, 13 Mass. 123.

2. One pew to each debtor is exempted from attachment. See cA. 341, Vol. 3, p. 187.



rights in houses of public worship, shall be hereafter considered and deemed in law, to be real estate ; but nothing in this act shall be construed to affect in any manner the titles to any such pews and rights heretofore considered or acquired, as of personal estate.

CH. 37.

Pews made real estate.
[Mass. Stat. Feb. 23, 1796, § 1.]

SECT. 8. *Be it further enacted*, That all deeds and conveyances of, and executions extended on such pews and rights may be recorded by the Clerk of the town or plantation wherein the same is situated ; and being so recorded shall have the same effect in law, as if the same had been recorded in the Registry of Deeds. [Approved February 20, 1821.]

Deeds of pews may be recorded by the town clerk.

[Ib. § 2.]

Chapter 37.

AN ACT for the Partition of Lands or other Real Estate.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That all persons having or holding, or that hereafter shall have or hold any lands, tenements,* or hereditaments, as tenants in common, joint tenants, or coparceners, may be compelled by writ of partition at the common law, to divide the same : and whereas the partition of lands and other real estate among the persons interested, though much desired and of great advantage, is often hindered and delayed by reason that infants are interested, or that the parties concerned are numerous and live remote from each other, and sometimes in parts beyond seas, and are some of them unknown (a) :

Tenants in common, &c. may sue for partition at common law.
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[Mass. Stat. Mar. 11, 1784, Preamble.]

(a) 1. It is no valid objection to an ancient record of partition by petition, under the statutes of 1784, and 1787, that no interlocutory judgment was formally entered, if it appears that notice was regularly given, and no one appeared to object, and that thereupon commissioners were appointed to make partition. *Sewall & als. vs. Ridlon*, 5 Gif. 458.

2. Partition made by parol, among joint tenants, is void. *Porter vs. Perkins & al.* 5 Mass. 228 ; *Porter vs. Hill*, 9 Mass. 35.

3. Proceedings in partition, in the S. J. Court, by petition, may lawfully be in any county, if no person appear to contest the title of the petitioner. But where an issue of fact is joined, the record is to be remitted for trial of

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Persons interested in common, &c. may petition Courts for partition—

[Ib. § 1.]

to be made by 3 or 5 freeholders—

SECT. 2. *Be it therefore enacted*, That any person or persons interested (b) with others in any lot, tract of land, or other real estate, making application (either by themselves or their agents, attornies, or guardians,) to the Supreme Judicial Court or Circuit Court of Common Pleas of the county in which such land or other real estate lies ; the said Courts are severally authorised and empowered to cause partition to be made of such lands or other real estate, and the share or shares of the party or parties applying for the same, to be set off and divided from the rest. The partition to be made by five or three freeholders (c) under oath (d), to be appointed (e) by the said Court, who shall order the partition,

the issue, to the county where the lands lie. *Sewall & als. vs. Ridlon*, 5 *Glif.* 458.

4. But if the trial is in any other county, and without consent of parties, yet the judgment will not be void for want of jurisdiction ; but will be good till avoided by writ of error. *Ib.*

(b) 1. A petition for partition, lies only for a person who has a seizin in fact, of the premises. *Bonner & als. vs. Ken. Purchase*, 7 *Mass.* 475.

2. But it lies for a tenant for years, although the tenant for the other part of the premises holds the same in fee. *Mussey vs. Sanborn*, 15 *Mass.* 155.

3. An administrator of an insolvent estate is not entitled to partition of land held by the intestate in common with others. *Nason vs. Willard*, 2 *Mass.* 478.

4. Nor can the heirs of a deceased respondent be admitted to defend, but the petition will abate. *Thomas vs. Smith & al.* 2 *Mass.* 479.

5. A petition for partition does not lie, where the applicants hold the whole of the land, of which partition is prayed. *Swett & al. vs. Bussey, & al.* 7 *Mass.* 503.

This objection is remedied in this State, by ch. 347, § 7, Vol. 3, p. 195.

(c) 1. It is not necessary that the commissioners, appointed to make the partition, should be inhabitants of the county in which the lands lie. *Sewall & al. vs. Ridlon*, 5 *Glif.* 458.

2. The commissioners need only assign the petitioners purparty. *Symonds vs. Kimball*, 3 *Mass.* 299.

(d) If they return that they have been duly sworn, it is sufficient without other evidence. *Symonds vs. Kimball*, 3 *Mass.* 299.

(e) 1. If upon a petition of partition the parties agree upon certain commissioners, to make the partition, there is no need of a judgment *quod partitio fiat*. *Symonds vs. Kimball*, 3 *Mass.* 299.

2. In a petition under the statute for partition, assuming in some of its

and a return of such partition, to be made into the Clerk's office of the said Court; and the partition or division so made being accepted by the said Court, which ordered the division to be made, and there recorded, and also recorded in the Registry of Deeds, in the county where such estate lies, shall be valid and effectual to all intents and purposes.

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accepted and
recorded—effect
thereof.
[Ib. § 3.]

SECT. 3. *Be it further enacted*, That neither of the said Courts shall proceed to order such partition, until it shall appear to them respectively, that the several persons interested in such estate and living within the State, or the attorneys of such as are absent, and have attorneys residing in the State, have been duly notified of such petition, (by being personally served with a copy thereof or a copy left at their dwelling house, or last place of abode, or that the substance of the petition shall have been inserted three weeks successively in one or more of the public newspapers) and have had an opportunity to make their exception to the granting the same(f).

Notice to be
given before
partition is or-
dered.

SECT*. 4. *Be it further enacted*, That when the facts alleged, in any petition for partition hereafter to be preferred, are controverted by any of the tenants in common, the answer or objection to the petition, shall be made in writing, in the form of a plea, to which the petitioner may reply or demur, to the end the matter in dispute may be reduced to an issue in law or fact, and receive a determination by the Court or a Jury, in the manner other issues are determined: And in case the issue be determined in favour of the petitioner,

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When facts
are contested,
a trial to be
had in usual
form.

[Mass. Stat.
Feb. 14, 1787,
§ 1.]

stages an adversary form, the appointment of commissioners by the Court to make partition is virtually and substantially equivalent to the entry of judgment *quod partitio fiat*. *Southgate vs. Burnham*, 1 Glf. 369.

3. In such cases, if the report of the commissioners be accepted by the Court and recorded as the statute requires, the entry of the final judgment *quod partitio predicta firma et stabilis, &c.* does not seem to be indispensably necessary. *Ib.*

(f) 1. Upon a petition for partition, and public notice pursuant to this statute, the right of possession of one claiming to hold in severalty part of the land described in the petition, and of which partition is prayed for, is bound by the judgment for partition. *Cook vs. Allen*, 2 Mass. 462.

2. A respondent may appear, after a return by commissioners has been made, and defend. *Ramsdell vs. Creasy*, 10 Mass. 170.

CH. 37. judgment shall be entered up by the Court, that partition be made by disinterested freeholders, and proceed to appoint them accordingly: And also that the petitioner recover against the adverse party the costs (*g*) attending the trial, and may issue execution for said costs in the form prescribed by law as in other cases. But if on such pleading it be determined that the petitioner holds a less share or proportion in common and undivided than he has in his petition alleged, the adverse party shall recover against the petitioner his reasonable cost; notwithstanding judgment may be rendered in favour of the petitioner to have an assignment of such part of the real estate in severalty, as he in fact holds in common and undivided.

If a petitioner owns less than he claims, respondent entitled to costs.

Appeal from C. C. C. Pleas and effect thereof.

[Ib. § 2.]

SECT. 5. *Be it further enacted,* That either party may appeal (*h*) from the judgment of the Circuit Court of Common Pleas, that partition shall be made to the Supreme Judicial Court, before the appointment of freeholders to make partition: But if no appeal is made until after the return of the freeholders, and the judgment of the Court thereon, the judgment that partition shall be made, shall not by such appeal be again called in question. And the Supreme Judicial Court shall upon the complaint of the appellee, (in case the appellant shall fail to enter or prosecute his appeal,) affirm the former judgment, and cause such other proceedings to be had thereon, as to have partition completed in the same way and manner as if the proceedings had been originally commenced in that Court.

In actions the appeal, &c. effect; same as in petitions.

SECT. 6. *Be it further enacted,* That in all actions of partition that shall be hereafter commenced, the same rule

(*g*) 1. Upon a petition for partition, wherein a case is agreed for the opinion of the court, no costs are to be taxed, unless it be specially agreed that the costs should await the decision of the court. *Reed & al. vs. Reed*, 9 *Mass.* 372.

2. *Paine & al. vs. Ward & al.* 4 *Pick.* 246.

3. See note *c*, 2, on p. 146.

(*h*) 1. No appeal lies from a judgment of the C. C. Pleas accepting the return of commissioners making partition. *Pierce vs. Oliver & als.* 13 *Mass.* 211.

2. Judgment of partition extends at most to bind the right of possession. The right of property is not at all affected by it. *Ib.*

and regulations shall take place with respect to an appeal from an interlocutory judgment of the Circuit Court of Common Pleas*, that partition shall be made, as is herein before prescribed upon the like judgment upon a petition for partition.

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SECT. 7. *Be it further enacted*, That before partition be made where any infants, persons *non compos mentis*, or otherways incapacitated to take care of their estates, are interested, guardians shall be appointed for all such persons by the Court, if they live within this State, and if any person or persons interested in any such estate happen (at the time when such application shall be made) to have been beyond sea, or out of this State for the space of one year, and not returned; and having no sufficient attorney within the same; in such case the said Court to whom application shall be made for partition, shall appoint some discreet and disinterested person or persons, as agent or agents for such absent party or parties, to be advising on his or their behalf in making such partition; and due notice shall be given by the committee to all concerned, (that are known and within the State,) before such partition be made, that they may be present, (if they see meet) at the time of making the same.

Before partition, Court to appoint guardians for minors, and agents for absent persons interested.

[Mass. Stat. Mar. 11, 1784, § 3.]


Committee to give notice before proceeding.

SECT. 8. *Be it further enacted*, That if any partner shall have a larger share set off than is such partner's true and real interest, or if any share set off should be more than equal in value to the proportion it was set off for, then and in every such case upon complaint to the Court which caused such partition to be made, within three years of the making thereof, by any aggrieved partner or partners, who at the time of making such partition were out of the State, and not notified thereof as aforesaid seasonably to be present at the same, the said Court shall cause partition thereof to be made anew. And in such new partition so much and no more shall be taken off from any share as such share shall be adjudged more than the proportion of the whole it was designed for, estimating such lands or real estate as in the state they were in when first divided; and in case any improvements shall be made on the part that may by such new partition be taken off as aforesaid, the partner who made such improvements shall have reasonable satisfaction made him by the partner or part-

New partition to be made, in certain cases, on complaint.

[Ib. § 3.]

Mode of making it and adjusting claims.

CH. 37.  **[*137]** ners to whose share the same shall be added, by the estimation of the freeholders employed* in making such new partition, or the major part of them. And the Justices of the same Court who ordered partition, are also empowered to issue execution for such satisfaction, and for costs in such new partition, the same being first taxed and allowed in the said Court. (i)

Courts may compel petitioners to pay their share of costs.
[1b. § 2.]

SECT. 9. *Be it further enacted*, That when partition shall be made as aforesaid, if any one or more of the interested parties applying, shall neglect or refuse to pay their just proportion of the charges which may attend such division, it shall and may be lawful for the said Court who ordered the partition, to issue an execution against the delinquent or delinquents interested, and applying as aforesaid: *Provided*, an account of such charge be first laid before the said Court who ordered the partition, and the just proportions of the persons interested, settled and allowed, they having been duly notified to be present at such settlement and allowance. And when any messuage, tract of land, or other real estate shall be of greater value than either party's purpart or share in the estate to be divided, and cannot at the same time be subdivided, and part thereof assigned to one, and part to another, without great inconvenience, the same may be settled or assigned to one of the parties, such party to whom the same shall be so assigned, paying such sum or sums of money to such party or parties, as by means thereof have less than their share of the real estate as the committee appointed to make partition, shall award. [Approved February 8, 1821.]

Special assignment may be to one, in certain cases.

Additional Act, ch. 485, Vol. 3, p. 334.

(i) Reviews may be granted of judgments upon petition for partition; See ch. 384, Vol. 3, p. 233. But application for review must be made within three years after the rendition of the judgment complained of; See ch. 432, Vol. 3, p. 276.

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AN ACT respecting Wills and Testaments, and regulating the Descent of Intestate Estates.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That every person of the age of twenty-one years, and of sane mind (a), lawfully seized of any lands, tenements, or hereditaments, within this State, in his or her own right in fee simple, or for the life or lives of any other person or persons, and every person as aforesaid, being the owner of any personal estate, may give, dispose* of, and devise said real (b) and personal estate by his or her last will and testament in writing, to and among his or her children or others, as he or she may see fit.

Persons who may dispose of estate by will.

[Mass. Stat. 1700† & Feb. 6, 1784, § 1.]

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SECT. 2. *Be it further enacted*, That all wills of any

† The statute of 1700 was not repealed by the statute of Feb. 6, 1784. *Terry vs. Foster & al.* 1 Mass. 150.

(a) 1. Of the effect of a will made *in terrorem*. *Small vs. Small*, 4 Glf. 220.

2. If a wife by her virtues has gained such ascendancy over her husband, that her pleasure is the law of his conduct, it is no reason for impeaching a will made in her favor, even to the exclusion of the residue of his family. *Ib.*

3. The legal construction of a will is exclusively a subject of common law jurisdiction; and is not cognizable by the S. J. Court, when sitting as the S. C. of Probate. *Ib.*

4. In the construction of a will the court will give effect to all the words without rejecting or controlling any of them. If it can be done by a reasonable construction not inconsistent with the manifest intention of the testator. *Davis vs. Swan & als.* 4 Mass. 208.

5. But if a latter clause is repugnant to a former one, the latter must prevail, unless it be inconsistent with the apparent intention of the testator. *Ib.*

6. No precise form of publication of a will is necessary; but the testator must know and intend the instrument signed to be his will. *Swett & al. vs. Boardman*, 1 Mass. 262.

(b) 1. Upon the death of a deviser, dying seized, the devisee is not seized, until an entry be made for his use, unless the tenements devised be vacant and unoccupied. *Wells vs. Prince*, 4 Mass. 64.

2. The same law applies to remainder man. *Ib.*

3. A stranger in possession under, or acknowledging the title of a devisee, or remainder man, is equivalent to an actual entry. *Ib.*

4. A devise of the *income* of lands is in effect a devise of lands. *Reed & al. vs. Reed*, 9 Mass. 372.

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Wills to be in writing and signed and attested, &c, by three witnesses.

[Mass. Stat. Feb. 6, 1784, § 2.]

Wills, &c. how revoked.

Devises for life and afterwards in fee tail, how construed.

[Mass. Stat. Mar. 8, 1792, § 3.]

lands, tenements or personal estate shall be in writing and signed by the party so devising or bequeathing the same, or by some person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the testator, by three (c) credible witnesses, or the same shall be utterly void. And no will in writing, of lands, tenements, hereditaments or personal estate, nor any clause thereof, shall be revoked, (d) except by a subsequent will or codicil in writing, or other writing, declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator, or in his presence and by his consent and direction ; but all wills of lands, tenements, or personal estate, shall remain and continue in full force until the same be burnt, cancelled, torn, or obliterated by the testator, or by his direction, in manner aforesaid, or unless the same be altered by some subsequent will or codicil, or other writing of the testator, signed in the presence of three witnesses, declaring such alteration.

SECT. 3. *Be it further enacted*, That whenever any person shall hereafter, in and by his last will and testament, devise any lands, tenements or hereditaments, to any person for and during the term of such person's natural life, and after his death to his children or heirs, or right heirs in fee, such devise shall be taken and construed to vest an estate for life only in such devisee, and a remainder in fee simple in such children, heirs or right heirs, any law, usage or custom to the contrary notwithstanding.

SECT. 4. *Be it further enacted*, That notwithstanding

(c) 1. The three subscribing witnesses must be produced at the probate thereof, if living, and subject to the process of the court. *Chase & als. vs. Lincoln*, 3 Mass. 236.

2. By "credible witnesses," competent witnesses are to be understood ; and it is sufficient that they are so at the time of their attestation. *Amory vs. Fellowes*, 5 Mass. 219. *Hawes vs. Humphrey*, 9 Pick. 350.

(d) 1. Of the revocation of a will. *Avery & al. vs. Pixley*, 4 Mass. 462.

2. A subsequent alienation by the testator of a part of the real estate devised, is a revocation of the will only as to that part. *Carter vs. Thomas*, 4 Glt, 341. *Hawes vs. Humphrey*, 9 Pick. 350.

3. *Laughton vs. Atkins*, 1 Pick. 535.

4. *Clark & al. vs. Wright*, 3 Pick. 67.

this act, any soldier being in actual military service, or any mariner, or seaman being at sea, may dispose of his moveables, wages and other personal estate, as he might have done before the making of this act.

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[Mass. Stat.
Feb. 6, 1784,
§ 6.]

SECT. 5. *Be it further enacted*, That no nuncupative (e) will shall be good, where the estate thereby bequeathed shall exceed the value of one hundred dollars, that is not proved by the oath of three witnesses, who were present at the making thereof, nor unless it be proved that the testator, at the time* of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect, nor unless such nuncupative will were made in the time of the last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she had been resident for the space of ten days or more, next before the making of such will; except where such person was unexpectedly taken sick, being from home, and died before he or she returned to the place of his or her habitation.

Nuncupative
wills how
proved in cer-
tain cases.

[Ib. § 3.]

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SECT. 6. *Be it further enacted*, That no letters testamentary or probate of any nuncupative will shall pass the seal of any Court of Probate, till fourteen days after the decease of the testator be fully expired, nor shall any nuncupative will be at any time approved and allowed, unless due notice shall have been given to all persons interested.

—not till after
fourteen days
from death of
testator, &c.

[Ib. § 4.]

SECT. 7. *Be it further enacted*, That after six months shall have passed, after speaking any pretended testamentary words, no testimony shall be received to prove the same as a nuncupative will, unless the said words or the substance thereof, were reduced to writing within six days after the same testamentary words were spoken.

—nor after six
months from
making, unless,
&c.

[Ib. § 5.]

SECT. 8. *Be it further enacted*, That if any person hath attested, or shall attest the execution of any will or codicil, to whom any beneficial devise, legacy, estate, interest, gift or appointment of, or affecting any real or personal estate (other than and except charges on lands, tenements or hereditaments, for the payment of any debt or debts) shall be

Legacies to
witnesses of
wills to be
void, and lega-
tees to be
competent
witnesses.

[Ib. § 11.]

(e) For evidence to establish a nuncupative will, See *Parsons vs. Parsons*, 2 Glf. 298.

CH. 38. thereby given or made, such devise, legacy, estate, interest, gift or appointment, shall so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly void, and such person shall be admitted as a witness to the execution of such will or codicil, such devise, legacy, estate, interest, gift or appointment, notwithstanding.

Creditors, in certain cases, competent witnesses to execution of wills.

Ib. § 12.]

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SECT. 9. *Be it further enacted*, That in case by any will or codicil already made or hereafter to be made, any lands, tenements or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged, hath attested or shall attest the execution of such will or codicil*, every such creditor notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil.

Legatees in certain other cases may be competent witnesses to wills, &c.

[Ib. § 13.]

SECT. 10. *Be it further enacted*, That if any person hath attested or shall attest the execution of any will or codicil, to whom any legacy or bequest is or shall be thereby given, and such person before he or she shall give his or her testimony concerning the execution of any such will or codicil, shall have been paid, or have accepted or released, or shall refuse to accept such legacy or bequest, upon tender thereof, such person shall be admitted as a witness to the execution of such will or codicil, notwithstanding such legacy or bequest : *Provided always*, That the credit of such witnesses as aforesaid, shall be subject to the consideration of the Court or Jury before whom such witness or witnesses may be examined, or his or her testimony or attestation made use of in like manner, to all intents and purposes as the credit of other witnesses in all other causes ought to be considered of and determined.

Legatees dying before testator, to be considered legal witnesses.

[Ib. § 14.]

SECT. 11. *Be it further enacted*, That in case any legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall hereafter be made, shall have died in the life time of the testator or before he or she shall have received or released the legacy or bequest so given him or her as aforesaid, and before he or she shall have refused to receive such legacy or bequest, on tender made thereof, such

legatee shall be deemed a legal witness to the execution of such will or codicil notwithstanding such legacy or bequest. CH. 38.

SECT. 12. *Be it further enacted*, That no person to whom any beneficial estate, interest, gift or appointment shall be given or made, which is hereby enacted to be null and void as aforesaid; or who shall have refused to receive any such legacy or bequest, on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he or she shall have been so examined, demand or receive any profit or benefit of or from any such estate, interest, gift or appointment, so given or made to him or her in and by any such will or codicil*, or, demand, receive or accept from any person or persons whatsoever any such legacy or bequest or any satisfaction or compensation for the same in any manner whatever.

No legatee, made hereby a competent witness, shall afterwards receive any benefit from such will by legacy or otherwise.

[Ib. § 15.]

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SECT. 13. *Be it further enacted*, That when any testator in and by his last will and testament, hath given or shall give any chattels or real estate (*f*) to any person or persons, and the same shall be taken in execution for the payment of the testator's debts, or shall be sold therefor as the law provides, in such case, all the other legatees, devisees and heirs, shall refund their average or proportional part of such loss to such person or persons from whom the bequest shall be so taken away, and he or they shall and may maintain a suit or action at law to compel such contribution (*g*).

Legatee having his part taken on execution for testator's debts to be refunded by other devisees, &c.

[Ib. § 18.]

SECT. 14. *Be it further enacted*, That when any child shall happen to be born after the death of the father, without having any provision made in his will, every such posthumous child shall have right and interest in the estate of his or her father, in like manner as if the father had died intes-


Posthumous children provided for.

[Ib. § 7.]

(*f*) All the lands of the testator, as well as his chattels, are liable to be taken in execution for the payment of his debts, if not satisfied by the executor. *Wyman vs. Brigden*, 4 Mass. 154. See notes to § 1 & 24, ch. 52.

(*g*) 1. An action for such purpose may be maintained against the other devisees, separately, and without any previous decree of apportionment by the Judge of Probate. *Brigden vs. Cheever*, 10 Mass. 450.

2. If any of the devisees in such case are insolvent, the plaintiff cannot call on the others to sustain any part of the consequent loss. *Ib.*

CH. 38.  tate, and the same shall be assigned to him or her accordingly ; and in every such case the Judge of Probate shall issue his warrant, as in case of intestate estates, to assign to such posthumous child,† a share in his or her father's estate equal to what he would have inherited, if his or her father had died intestate ; and the same shall be taken in proportion from the devisees and legatees, who own the estate by virtue of such will.

[† *Annable vs. Patch & al.* 3 *Pick.* 360.]

Children, &c. not named in the will of their parents to inherit as in cases of intestacy—provided, &c.

[*Ib.* § 8.]

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Widow may waive provision in husband's will & claim her dower.

SECT. 15. *Be it further enacted,* That any child or children, or their legal representatives, in case of their death, not having a legacy given him, her or them (*h*), in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her or them, as though such parent had died intestate : *Provided*, such child, children or grand children have not had an equal proportion of the deceased's estate bestowed on him, her or them, in the deceased's life time. And when any child, grand child or other relation, having a devise of real or personal estate, and such devisee shall die (*i*) before the testator, leaving lineal descendants, such descendants shall take the estate real or personal in the same way and manner, such devisee would have* done, in case he had survived the testator, any law, usage or custom to the contrary notwithstanding. Also the widow in all cases may waive the provision made for her in the will of her deceased husband, and claim her dower and have the same assigned (*j*) her in the same manner as though her husband had died intestate.

SECT. 16. *Be it further enacted,* That all such estate,

(*h*) To exclude a child from a distributive share in the estate of the testator, it is not necessary that such child should have a legacy in the will—it is sufficient if it appears by the will that the testator had not forgotten the child. *Terry & als. vs. Foster & al.* 1 *Mass.* 146 ; *Church vs. Crocker*, 3 *Mass.* 17.

(*i*) Where a devisee dies before the testator, leaving no lineal descendants, the devise lapses. *Fisher vs. Hill*, 7 *Mass.* 87. See note *a* 3, on p. 136 of this volume ; also, *Hayden vs. Stoughton*, 5 *Pick.* 528.

(*j*) If a widow waive the provision made for her in the will of her husband, she may have her dower assigned in his real estate ; but she can receive no part of his personal estate, if he has disposed of it by will. *Perkins vs. Little & al.* 1 *Glf.* 148 ; *Currier's case*, 3 *Pick.* 375.

real or personal, that is not devised or bequeathed in the last will and testament of any person hereafter to be proved, shall be distributed in the same manner as if it were an intestate estate (k).

SECT. 17. *Be it further enacted*, That when any person shall die seized of any lands, tenements or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple, or for the life of another, not having lawfully devised the same, the same shall descend in equal shares to his children, and to the lawful issue of any deceased child by right of representation ; and when the intestate shall leave no issue, the same shall descend to his father ; and when there shall be no issue nor father, the same shall descend in equal shares to the intestate's mother, if any, and to his brothers and sisters, and the children of any deceased brother or sister by right of representation ; and if the intestate leave no issue, father, brother or sister, then the same shall descend to his mother, if any, but if there be no mother, then to his next of kin, in equal degree ; the collateral kindred claiming through the nearest ancestor, to be preferred to the collateral kindred claiming through a common ancestor more remote ; and the degrees of kindred, in all cases to be computed according to the rules of the civil law ; and when there shall be no kindred the same shall escheat to the State, saving always to the intestate's husband his tenancy by the courtesy ; and to his

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Estate not devised to be distributed as intestate. [Ib. § 10.]

Intestate estates how to descend and be distributed.

[Mass. Stat. Mar. 12, 1806, § 1.‡]

Rules in regard to kindred, and mode of computing degrees.

(k) 1. In the Mass. Law, § 10, from which this provision is copied, after the word "estate", was the following provision :—

"*And the executor or executors shall administer on the same as such.*"

In *Hays & al. Exec. vs. Jackson & al.* 6 Mass. 152, the Court said : "A question has been made whether the executor must take out administration on such undevise estate, or whether he shall administer it *ex officio* as executor. The usage has been to administer it without a letter of administration : and we are satisfied this usage is correct."

‡ The chief object of the Legislature in this Statute seems to have been, not to establish new rules of descent and distribution, but to adopt and confirm, in clear and explicit language, the legal construction which has been given to the preceeding Statutes [22 & 23 Car. 2, c. 10 ; Prov. st. 4 Wil. & Mar. c. 2 ; ib. 9 Ann, c. 2 ; Mass. st. March 9, 1784 ;] and which had been considered the law of the country for more than a century. *Sheffield vs. Lovering*, 12 Mass. 493. *Runey & al. vs. Edmands*, 15 Mass. 293.

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Proviso as to
children dy-
ing under age,
&c.

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Tenancy by
the courtesy.

[Mass. Stat.
Mar. 9, 1784,
§ 4 & 5.]

Dower of wid-
ows.

Personal es-
tate how dis-
tributed, after
payment of
debts, &c.

[Mass. Stat.
Mar. 12, 1806,
§ 2.]

widow, her dower at the common law, unless she be lawfully barred of the same: *Provided however*, That when any child shall die under age, not having been married, his share of the inheritance that came from his father or mother, shall descend in equal shares to his father's or (l) mother's other children then living respectively, and to the issue of such other children as are then dead, if any, by right of representation: And *provided* further*, That when the issue or next of kin to the intestate, who may be entitled to his estate by virtue of this act, are all in the same degree of kindred to him, they shall share the same estate equally, otherwise they shall take according to the right of representation.

SECT. 18. *Be it further enacted*, That when a man and his wife shall be seized of lands, tenements or hereditaments, in her right in fee, and issue shall be born alive of the body of such wife, that may inherit the same, and such wife shall die, the husband shall have and hold such estate during his natural life, as tenant by the courtesy. And the widow of the deceased shall in all cases, be entitled to her dower in the real estate (where she shall not have been otherwise endowed before (m) marriage) and to a recovery of the same in manner as the law directs.

SECT. 19. *Be it further enacted*, That when any person shall die possessed of any personal estate, or of any right or interest therein not lawfully disposed of by last will, the same, after allowing, to the widow, if any, her wearing apparel, according to the degree and estate of her husband, and such further necessities as the Judge of Probate shall order, regard being had to the state of the family under her care, shall first be applied to the payment of the intestate's debts with the charges of his funeral, and of settling his estate; and the

(l) This means, the other children of the father or mother from whom the share was derived. *Sheffield vs. Lovering*, 12 Mass. 493.

2. Where A. dies seized in fee of land, leaving an only child, B. and a widow, who is the mother of the child, and also of other children by a former husband; and the child B. dies under age, and not having been married; the land descends in equal shares to the surviving mother, and to the other children by a former husband, they being brothers and sisters, of the half blood, to B. *Ib.*; & *Runey vs. Edmonds*, 15 Mass. 293.

(m) *Hastings vs. Dickinson & ux.* 7 Mass. 153.

residue, if any, shall be distributed among the same persons in the same proportion to whom the real estate shall by law descend : *Provided however*, That the husband of the intestate shall be entitled in all cases, to the whole of the said residue ; and further that if the intestate shall leave a widow and issue, the widow shall be entitled to one third part of the said residue ; or if there be no issue, to one half part thereof ; or if there be no kindred to the said intestate, then she shall be entitled to the whole of said residue : *And provided further*, That when there shall be no husband, widow nor kindred to the intestate, the whole of the said residue shall escheat and enure to the State. [Approved March 20, 1821.]

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Proviso as to husband of intestate.

When no kindred to escheat to State.

Chapter 39.*

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AN ACT respecting Mortgages, and the Rights in equity of Redemption.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That where any mortgagee or vendee, claiming any lands or tenements granted upon condition by force of any deed of mortgage or bargain and sale with defeasance, or any person claiming and holding under them, have lawfully entered and obtained, or shall lawfully enter and obtain, the actual possession of such lands or tenements, for the condition broken, the mortgagor or vendor, or other person lawfully claiming under them (a),

Rights of redemption for 8 years after entry of mortgagee.

[Mass. Stat., Mar. 1, 1799, § 1.]

(a) 1. If two distinct closes are included in the same mortgage, and the mortgagor convey the closes in fee to different persons, by whom they are held in severalty, the mortgagee to foreclose, must have two several writs of entry. *Taylor & al. vs Porter*, 7 Mass. 357.

2. But in such case the mortgagee shall have judgment on each writ, unless the mortgage money be paid ; and if either grantee pay the money, the mortgage is discharged as to the other, but the other grantee will be holden to a reasonable contribution. *Ib.*

3. Lands mortgaged cannot be levied upon for the debt of the mortgagee, unless he shall first have entered upon the same. *Blanchard vs, Colburn & ux.* 16 Mass. 345.

CH. 39. shall have a right to redeem (b) the same, at any time within three years next after such possession obtained, and not afterwards ; and upon payment or tendering (c) of payment of the original debt and damages, with lawful interest and costs, or performing or tendering performance of such other condition, as the case may require, or such part thereof as was remaining unpaid or unperformed at the time of such entry, together with such further reasonable sums as may have been disbursed and expended in necessary repairs of fences and buildings, and for the advancing and bettering such estate, over and above what the rents and profits thereof, upon

(b) 1. In case of the death of the mortgagor, his heir or assignee alone can maintain a suit for redemption. *Smith vs. Manning*, 9 Mass. 423.

2. Nor can the heir come in and prosecute such suit if the mortgagee die pending the suit. *Ib.*

3. But the heirs may renew the suit by bill of revivor. *Putnam & al vs. Putnam*, 4 Pick, 139.

4. The right in equity of redeeming real estate mortgaged, is such an interest in land as cannot, by our statute of frauds, be passed by parol. *Scott vs. McFarland*, 13 Mass. 310.

5. In computing the three years, the day of entry must be excluded. *Wing vs. Davis & al*. 7 Glf. 33. *Windsor vs. China*, 4 Glf. 298.

6. If the mortgagee assign, the action to foreclose must be in the name of the assignee. *Gould vs. Newman*, 6 Mass. 239.

7. A mortgage in fee may be assigned, even without an actual entry by the mortgagee. 8 Mass. supplement, 566.

8. No interest passes by a mere delivery of a mortgage deed, without an assignment in writing, and by deed. *Warden vs. Adams*, 15 Mass. 233 ; *Parsons vs Welles*, & al. 17 Mass. 419.

9. Nor will the assignment of a note secured by mortgage operate as an assignment of the mortgage. *Ib.* & 8 Mass. 557. See 4 Pick. 131.

(c) 1. Where a mortgage has been assigned, and the assignee has entered, the tender for redemption must be made to him. *Wing vs. Davis & al.* 7 Glf. 33.

2. A tender of money in a bag, made at the window of a house, the creditor being there, and not admitting the debtor within the house, is sufficient. *Ib.*

3. But such tender, made after day light is gone, is too late. *Ib.*

4. A tender of payment by the mortgagor was holden to have been rightly made to the administrator of the mortgagee. *Scott & als. vs. McFarland*, 13 Mass. 309.

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a just computation, shall amount to, to such mortgagee, vendee or person lawfully claiming and holding under them, and in possession as aforesaid, within the time aforesaid; such mortgagee, vendee, or other person claiming, and in possession as aforesaid, to whom such tender has been, or shall be made, shall be obliged to accept such payment, or other performance of the condition, and thereupon to restore and deliver possession of such estate, and seal, execute, acknowledge and deliver a good and sufficient deed in the law of release and quitclaim, and all his right therein, to the person making such tender, having lawful right to redeem the same, or cause satisfaction and payment to be entered in the margin of the record of such mortgage in the Register's office, and shall sign the same, which shall forever after discharge and release such mortgage, and perpetually bar all actions to be brought thereupon in any Court of Record. And if, on payment or tendering of payment, performing or* tendering of performance as aforesaid, such mortgagee, vendee, or person lawfully claiming or holding under them, and in possession as aforesaid, doth or shall refuse or neglect to deliver possession, and release his right in such estate as aforesaid; such mortgagor, vendor or other person lawfully claiming as aforesaid, may have his bill in equity (d) originally triable in the Supreme Judicial Court, or Circuit Court of Common Pleas in the county where the estate lies, and shall insert the same in a writ of attachment or original summons, returnable to the Court whose seal it shall bear, and shall cause such writ to be served on the adverse party, as other writs of attachment or original summons are by law to be served: *Provided however*, That the entry above described, shall be, by process of law, or by the consent in writing of the mortgagor or those claiming under him, or by the mortgagee's taking peaceable and open

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Process in equity, in case mortgagee refuse to restore possession.

Proviso as to nature of mortgagee's entry.

(d) 1. A bill in equity, in such case, is the only remedy for the mortgagor. *Parsons vs. Welles & als.* 17 Mass. 419.

2. *Gibson vs. Crehore*, 5 Pick. 146.

3. *Saunders & al. vs. Frost*, 5 Pick. 259.

mortgaged, in presence of two

where enacted, That the Justices of the Peace are hereby empowered and authorized to try every such cause, as shall be brought before them; and on consideration of the several objections made by either party (or by the party not appearing in case the other party upon being duly summoned not appear but makes default) to decree and enter judgment therein, agreeably to equity and good conscience, and to award execution (f) accordingly; and in case of the

Nothing short of actual notice to the mortgagor will supply the want of continued possession. The object intended by the statute is, that the mortgagor may know when the three years commence, beyond which his right to redeem will cease. *Thayer & al. vs. Smith*, 17 Mass. 431; See *Reed vs. Davis & al.* 4 Pick. 216; *Skinner & al. vs. Brewer*, ib. 468.

2. In order to obtain judgment for possession, before condition broken, the mortgagee in his writ, may count generally on his own seizin and the disseizin of the defendant; and if he obtain judgment before condition broken, it will be at common law, and not upon the statute. *Erskine vs. Townsend*, 2 Mass. 493.

3. But after condition broken, the mortgagee must sue a special writ of entry. *Ib.*

4. Yet, see *Green vs. Kemp*, 13 Mass. 515; *Partridge and ux. vs. Gordon*, 15 Mass. 486; *Darling vs. Chapman*, 14 Mass. 101; *Somes vs. Skinner*, 16 Mass. 348.

(f) 1. A mortgagee, after a recovery on a bill in equity by the mortgagor to redeem, and before possession taken under the judgment, may lawfully take down and carry away any buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil, as that they cannot be removed without prejudice to it. *Taylor vs. Townsend*, 8 Mass. 411.

2. A mortgagor cannot maintain a bill in equity to redeem, without averring and proving a tender of the sum actually due, which he must ascertain at his peril; unless in fact it should appear that the rents and profits amounted to the sum due the mortgagee. *Tirell vs. Merrill*, 17 Mass. 117.

3. If a balance be proved due to the mortgagor from the mortgagee, the former cannot have judgment and execution for such balance, upon his bill in equity, but is put to his action at law. *Taylor vs. Weld & al.* 6 Mass. 264. See onward, § 5.

4. After a mortgagee has entered for condition broken, the mortgagor may, upon payment or tender of payment of the sum due by the mortgage, maintain a bill in equity to recover possession, although he be already in the

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non-appearance of the party complained of, or of his refusal to accept such sum as the Court shall adjudge to be due, or to accept such other act or thing as the Court shall adjudge a reasonable and equitable performance of the condition of the deed, and thereupon to restore possession and execute a release as aforesaid, such sum being left in the custody of the Court on behalf and for the use of such party, or such other act or thing as the Court shall order and direct, being done by the complainant, judgment shall be entered up for the complainant to recover possession of such estate, and execution shall issue accordingly; and the Court may, at their discretion, award costs to either party, as equity may require: *Provided*, That nothing herein contained shall be construed* to prevent an appeal from the judgment of any Circuit Court of Common Pleas, rendered upon any process given by force of this act.

Proviso for appeal from C. C. of C. Pleas.

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SECT. 3. *Be it further enacted*, That in all real actions, on mortgage, or bargain and sale with defeasance, the judgment shall be conditional (g), that if the mortgagor or vendor, his heirs, executors or administrators, shall pay unto the mortgagee or vendee, his executors or administrators, such sum as the Court shall adjudge due, within two months from the time of entering up judgment, with interest, then no writ

Judgment on mortgages to be conditional.

[Mass. Stat. Nov. 4, 1785.]

actual possession; for in legal contemplation his possession is that of the mortgagee. *Hicks vs. Bingham*, 11 Mass. 300.

5. It is said, that when a bill in equity is instituted against a mortgagee, to redeem the mortgage, if the plaintiff be unable to prove the payment of the money received by the mortgagee, he may require the mortgagee to answer under oath to the fact. *Parsons vs. Welles & al.* 17 Mass. 427.

6. If one of three joint mortgagees in a subsequent mortgage, elects not to pay his proportion for redeeming a prior mortgage, and the other two redeem it, they will have a prior lien on the estate for the amount so advanced. *Saunders & al. vs. Frost*, 5 Pick. 259.

(g) 1. Of the cases in which conditional judgment is to be entered. *Partidge & ux. vs. Gordon*, 15 Mass. 487.

2. Where a mortgage is given as collateral security for payment of a bond, conditional judgment will be rendered for the amount of principal and interest due, although it exceed the penalty of the bond. *Cutts vs. Tilden & al.* 2 Mass. 118.

CH. 39. of possession shall issue, otherwise the plaintiff shall be entitled to his writ of possession in due form of law.

In suits for redemption assignees of the estate may be made parties, if necessary.

[Mass. Stat. Feb. 18, 1819, § 1.]

Proceedings if they appear.

Court may enter decree and issue execution jointly or severally.

[Ib. § 2.]

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Court may deduct from money brought in the amount re-

SECT. 4. *Be it further enacted*, That when it shall appear to the Court, in any suit, which is, or may be pending for the redemption of lands or tenements, granted and held upon condition, by force of any deed of mortgage, or bargain and sale with defeasance, that by reason of any assignment(h) or conveyance thereof, before the commencement of such suit, or for any other cause, it is necessary to the attainment of justice, that some other person claiming or holding by force of such conveyance, should be made party to the suit with the original defendant, the Court may, on motion, and upon such terms, with regard to costs, as they shall deem reasonable, order such person to be made a party to the suit, by serving him with an attested copy of the original bill in equity, and the motion and order thereon, in such manner as the Court may direct. And upon the appearance or default of the person so summoned, the suit shall proceed in the same manner as if he had been originally made a defendant.

SECT. 5. *Be it further enacted*, That when a decree shall be made for the redemption of any lands or tenements granted and held as aforesaid, the Court shall have power to enter a decree or judgment, and to award execution against any defendant or defendants, jointly or severally, as the case may require, for such amount in damages, as shall, in equity and good conscience, be found due from him or them respectively, for the rents and profits received, over and above the sums reasonably expended in repairing and bettering the estate to be redeemed.

SECT. 6*. *Be it further enacted*, That when any sum of money shall have been brought into Court, in any suit for the redemption of lands or tenements, granted and held as aforesaid, the Court shall have power to deduct therefrom

(h) Generally, when a mortgagee makes an assignment upon the back of the mortgage deed, or by a deed of separate instrument referring to it, the assignee is put in the place of the mortgagee, to all intents and purposes; unless a different intention is apparent from their contract. *Hills vs. Elliot*, 12 Mass. 31.

such sum as the party for whose use it was brought in, may be justly chargeable with, by reason of rents and profits which he has received (i), or costs awarded against him in the same suit ; and the amount so deducted, shall be restored to the party who brought in the same. And if any person to whom money is tendered, in order to redeem lands or tenements granted and held as aforesaid, shall receive of the person tendering the same, a larger sum than he is justly entitled to retain, he shall be held to account for the excess, in manner aforesaid.

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received by mortgagee for rents, &c. and restore it to the mortgagor.

[Ib. § 3.]

SECT. 7. *Be it further enacted*, That whenever any mortgagor, who shall have mortgaged any real estate to the State, his executors, administrators, heirs or assigns, shall pay into the treasury the full sum due on such mortgage, the Treasurer may, and it shall be his duty, to sign and seal a discharge of such mortgage, and a release and quitclaim to the estate therein mentioned to be granted ; and to acknowledge the same before a Justice of the Peace ; which deed being recorded in the Registry of Deeds for the county where such estate is situate, shall effectually discharge such mortgage to all intents and purposes : *Provided however*, That nothing in this act shall be construed to authorize any mortgagor, his heirs, executors, administrators or assigns, to redeem any mortgaged premises, after the expiration of three years from the entry of the State by the Treasurer, or his substitute, or any other person thereto authorized by law upon the mortgaged premises, for the breach of the condition of the mortgage.

State Treasurer may discharge a mortgage to the State.

[Mass. Stat. Mar. 15, 1905, § 1.]

No redemption, after end of 3 years from entry by treasurer.

SECT. 8. *Be it further enacted*, That whenever there shall be a disagreement between the Treasurer for the time being, and the person applying to redeem any real estate mortgaged to the State, as to the sum equitably due on such mortgage, the person so applying and having a right to redeem such estate, may file a bill in equity for the redemption thereof, in the Supreme Judicial Court in the county of Cumberland, and the same Court shall cause an attested

In case of disagreement between treasurer and mortgagor, he may file bill in equity.

[Ib. § 2.]

(i) 1. A mortgagee in possession is not chargeable with lost rent, unless it is lost through his negligence. *Saunders & al. vs. Frost*, 5 Pick. 259.

2. *Gibson vs. Crehore*, 5 Pick. 146.

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[\*148]

Proceedings  
thereon.

Proviso as to  
costs and  
charges.

In case of mort-  
gagee's death  
before posses-  
sion, his ex-  
ecutor or ad-  
ministrator  
may dispose of  
the property  
as personal es-  
tate,

[Mass. Stat.  
Feb. 11, 1789,  
§ 1, and 2.]

and may bring  
action for  
mortgaged es-  
tate,

of which when  
recovered  
they shall be  
seized to use  
of heirs, &c.

copy\* of such petition, with a summons thereon, to appear at the next term of said Court in said county, to be served fourteen days before the commencement thereof, on the Treasurer, who is hereby authorized in behalf of the State, to appear in said Court and answer to such petition; and the said Court within said county shall proceed to hear the parties, and shall determine and adjudge what sum is justly due on said mortgage to the State; and the Treasurer shall be empowered, and it shall be his duty to accept the sum adjudged by said Court, to be due on said mortgage, and upon receiving the same to discharge and release such mortgage in the manner prescribed in the third section of this act: *Provided always*, that all the costs and charges of discharging such mortgage, and of the process for ascertaining the sum due on the same, shall be borne by the person or persons, applying to redeem the estate mortgaged, and not by the State or the Treasurer.

SECT. 9. *Be it further enacted*, That whenever any person or persons, to whom any lands, tenements or hereditaments may be mortgaged for the payment of debts, or the performance of any collateral promise or engagement whatsoever, shall decease before recovery of seizin and possession of the lands, tenements or hereditaments mortgaged, that then the debts due, on said deed or mortgage, and the lands, tenements or hereditaments, mortgaged by the same, shall be assets in the hands of executors or administrators, as personal estate, and the executors or administrators shall have the same control and power of disposal of all the estate which the said deceased had, in the lands, tenements and hereditaments mortgaged, as if they had been a pledge of personal estate; and executors or administrators may bring actions for recovery of seizin and possession of the lands, tenements and hereditaments mortgaged, as aforesaid; in which actions, it shall be sufficient to declare on the seizin and possession of the testator or intestate. And whenever executors or administrators shall recover seizin or possession of lands, tenements or hereditaments mortgaged as aforesaid, the executors or administrators, shall be seized and possessed of the estate so recovered to the sole use and be-

hoof\* of the widow and heirs of the intestate, or such devisees of the testator to whom said estate may be devised.

SECT. 10. *Be it further enacted*, That after executors or administrators shall recover seizin and possession of any lands, tenements or hereditaments, mortgaged as aforesaid, if any mortgagor, his heirs, executors, administrators or assigns, shall within the time limited for redeeming the estate mortgaged, redeem the mortgaged premises, the executors or administrators shall be entitled to receive the said redemption money, and are hereby authorized, empowered and directed to discharge the said mortgaged premises by release, quitclaim or other legal conveyance.

SECT. 11. *Be it further enacted*, That in case the purchaser of any right in equity to redeem mortgaged real estate taken and sold on execution and redeemed from such sale by the execution debtor or debtors, within one year next after the time of executing, by the officer to the purchaser aforesaid, the deed thereof by the payment, by the debtor (j) or debtors of such sum, as may by such sale, have been satisfied on such execution†, with the interest thereof, deducting the rents and profits the purchaser or any under him may have received over and above repairs made by the purchaser or any under him, shall have satisfied and paid the mortgagee, his heirs or assigns, the sum due on said mortgage, the mortgagor shall have the right to redeem such mortgaged estate of such purchaser, or any under him, at the time and in the way and manner he might have redeemed the same of the mortgagee, had no such sale been made, and at such time only. [Approved February 5, 1821.]

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[\*149]

Executors and administrators having recovered seizin of mortgaged estate, may receive redemption money & discharge mortgage.

[Ib. § 3.]

Mode of redeeming an estate from the purchaser of a right in equity taken on execution.

[Mass. Stat. Feb. 16, 1816, § 1.]

[†See act passed March 4, 1833.]

(j) 1. The mortgagor's whole interest is gone, if he does not within the year after sale of the equity, redeem the equity sold. He has no right afterwards to redeem the land mortgaged, although the purchaser of the equity should not redeem. *Ingersoll vs. Sawyer*, 2 Pick. 276.

2. *Reed vs. Bigelow*, 5 Pick. 281.

3. A tender to redeem a right in equity sold on execution, must be unconditional, and unaccompanied by a requirement of a release. *Loring vs. Cooke*, 3 Pick. 48.

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## Chapter 40.

## AN ACT concerning Dower.

Dower to be assigned within one month after demand — if not widow may sue.

[Mass. Stat. Mar. 11, 1784, § 1.]

[\*150]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That when the heir or tenant (a) of the freehold, shall not within one month next after demand (b), assign and set out to the widow of the deceased her dower (c) in all lands, tenements or hereditaments whereof by\* law she is or may be dowable (d), according to

(a) 1. When the demand is against the defendant as being in possession of the land, it is a good plea in bar that he is not the tenant in possession. *Merrill vs. Russell*, 1 Mass. 469.

2. See *Parker vs. Murphy*, 12 Mass. 485; *Otis vs. Warren*, 16 Mass. 53.

(b) 'The demand, and assignment may be by parol. And authority to demand dower, implies power to assent to, or receive the assignment of it. *Baker vs. Baker*, 4 Glf. 67; *Jones & ux. vs. Brewer*, 1 Pick. 314.

(c) 1. *Dower* is a term well known to the law, and has reference only to real estate. *Brackett Ex. vs. Leighton*, 7 Glf. 385.

2. The right of a widow to have dower assigned in the lands of her husband, cannot be taken in execution for her debt. *Nason vs. Allen*, 5 Glf. 479.

(d) 1. The wife of a mortgagor is dowable of the equity of redemption, against all persons but the mortgagee; against him, her remedy is by bill in equity. *Smith vs. Eustis*, 7 Glf. 41; *Carll vs. Butman*, ib. 103.

2. A widow is not dowable of an equity of redemption purchased by the husband during coverture, unless he have obtained a discharge of the mortgage. *Bird vs. Gardner*, 10 Mass. 364.

3. Nor of lands mortgaged by the husband before marriage, and which have not been redeemed. *Scott vs. Hancock & al.* 13 Mass. 162; *Bolton vs. Ballard*, ib. 227.

4. A widow is not dowable of land in a wild and uncultivated state. *Conner vs. Shephard*, 15 Mass. 164.

5. Nor in lands aliened by her husband while in such condition, and subsequently cultivated. *Webb vs. Townsend*, 1 Pick. 21.

6. An actual corporeal seizin, or a right to such seizin, in the husband during the coverture, is indispensable to entitle his widow to dower. A legal seizin of a vested remainder, is not sufficient for that purpose. *Eldridge & al. vs. Forrestal & ux.* 7 Mass. 253.

7. But when one was possessed of an equity of redemption, and conveyed the premises in fee, the grantee agreeing to pay the mortgagee the amount of the mortgage and the balance to the grantor, which was done according-

the true intendment of the law, then such widow may sue for and recover the same by writ (e) of dower, of such heir, or tenant of the freehold. CH. 40.

SECT. 2. *Be it further enacted*, That upon rendering judgment for any woman to recover her dower in any lands, tenements or hereditaments, reasonable damages (f) shall be awarded to her from the time of such demand and refusal: And a writ of seizin shall be directed to the Sheriff of the county or his deputy, who shall cause her dower in such estate to be set out to her by three disinterested freehold-

In such suit plf. may recover damages from time of demand. [1b. § 2.] Sheriff, on writ of seizin to cause dower to be set off by 3 disinterested freeholders on oath.

ly, the wife of the grantor was holden entitled to her dower in the premises. *Bolton vs. Ballard*, 13 Mass. 227; *Hildreth vs. Jones & al.* ib. 525. See *Nason vs. Allen*, 6 Glf. 243.

8. Dower is to be proportioned, against the aliene of the husband, to the value of the lands as they existed at the time of the alienation. *Copp vs. McDugal*, 9 Mass. 8; *Webb vs. Townsend*, 1 Pick. 21; *Stearns vs. Swift*, 8 Pick. 532.

9. But against the heir, dower is to be assigned in the improvements made by him after the descent. *Catlin vs. Ware*, 9 Mass. 218.

10. The proportion need not be one third in quantity, but so much as will yield one third of income. *Conner vs. Shepherd*, 15 Mass. 164.

11. If the husband aliene to two in severalty, the dower is to be assigned out of each distinct parcel of land. So if he aliene to one, and the grantee conveys to several in separate parcels. *Gooding & al. vs. Fosdick*, 1 Glf. 30.

12. Tenants in severalty, of distinct parcels of land, cannot be joined in a writ of dower. *Ib.*

13. Where the husband is seized but for an instant; as where he purchases and gives a mortgage back at the same time to the grantor, his widow is not entitled to dower. *Holbrook vs. Finney*, 4 Mass. 566; See also, *Clark vs. Munroe*, 14 Mass. 351; *Walker vs. Griswold*, 6 Pick. 416; See *Kimball vs. Kimball*, 2 Glf. 226.

(e) 1. In an action for dower, where the issue is taken on the demandant's marriage, and on the husband's seizin, the demand is thereby confessed, and need not be proved. *Ayer vs. Spring*, 10 Mass. 83.


2. A writ of dower, at common law, may be maintained in a case where the probate court would have authority to cause an assignment of dower. *Stearns & al. vs. Stearns*, 16 Mass. 167.

3. How writs of dower are to be served, see onward, ch. 59.

4. A widow has no right to enter upon land in which she has a right of dower, until assignment be made, and in case she does, and the heir bring his writ of entry, she can make no defence under her claim of dower. *Hildreth vs. Thompson*, 16 Mass. 193.

(f) The damages are measured by the annual value of the land, which the court, as well as a jury, may ascertain. *Perry vs. Goodwin*, 6 Mass. 498.



CH. 40.  ers (g) of the same county, who shall be under oath to set out the same equally and impartially without favour or affection, as conveniently as may be.

Dower of rents and profits may be assigned of rents and profits.

[Ib. § 3.]

Alien widow of a citizen dowerable.

[Mass. Stat. Feb. 23, 1813, § 1.]

Where husband dies seized, widow entitled to one third of rents, income, &c. until dower shall be assigned.

[Mass. Stat. Dec. 11, 1816.]

Nature of the estate of which a widow may be endowed;

[\*151]

except where she may have released her dower.

SECT. 3. *Be it further enacted*, That of estates of which a woman is dowerable, and where no division can be conveniently made by metes and bounds, dower shall be assigned in a special manner, as of a third part of the rents or profits to be computed and ascertained in manner as aforesaid.

SECT. 4. *Be it further enacted*, That the widow of any citizen of the United States, who may have been, or who shall be an alien at the time of intermarriage with such citizen, shall be entitled to dower in her husband's estate in this State in the same manner as other widows are by virtue of this act.

SECT. 5. *Be it further enacted*, That in all cases, where any person has died or shall die, seized of any estate, leaving a widow who is lawfully entitled to dower therein, such widow shall be entitled to have and receive one undivided net third part of the rents, income and profits of such estate until the heir or heirs of such deceased person shall assign and set out to such widow her dower according to law, or until the same shall be actually assigned and set out to her under a judgment of Court, or on order of a Court of Probate (h).

SECT. 6. *Be it further enacted*, That the estate in which a widow shall have a right to claim dower by this act, is all such lands, tenements and hereditaments of which the husband was seized, in fee, either in possession, reversion or remainder, at any time during the marriage, except where such\* widow, by her own consent, may have been provided for by way of jointure, prior to the marriage, or where she may have relinquished (i) her right of dower by deed under her hand and seal. [Approved February 19, 1821.]

(g) The Sheriff's return that dower has been set off by three disinterested freeholders, is conclusive. And if the persons were not freeholders, he is liable to the party injured for a false return. *Eastabrook vs. Hapgood*, 10 Mass. 313.

(h) This § is intended to give her remedy only against the heirs of the husband; & she is not so entitled against purchasers until she has made a demand of dower. *Gibson vs. Crehore*, 3 Pick. 475; *Same vs. Same*, 5 ib. 146.

(i) 1. Respecting a feme covert's power to relinquish her dower, see notes to § 2, ch. 36, p. 142, of this volume; also, *Rowe vs. Hamilton*, 3 Olf. 63.

2. The wife of a man under guardianship may relinquish her claim to dower, by ch. 380, § 4, Vol. 3, p. 231.

## Chapter 41.

## CH. 41.

AN ACT to provide for the Location of certain reserved Lands.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That wherever in the grant of any township, or parts thereof heretofore made, or which may be made hereafter, there may be certain lots therein reserved for the use of said township, and for public uses, and the lots so reserved as aforesaid, shall not be located by the grantee or grantees of such township, or part thereof by the time the said township may be incorporated, it shall and may be lawful for the Justices of the Circuit Court of Common Pleas within the County where such land lies, on application made to them by the assessors of such town, or a major part of them, and no sufficient cause being shown to the contrary, to appoint a committee, by issuing their warrant under the seal of said Court, directed to three disinterested freeholders of said county, requiring them as soon as may be to locate the several lots in said township reserved as aforesaid, and to designate the several uses for which the said lots were respectively reserved in the original grant of the said town, or of the parts thereof; the said lots to be of an average quality with the residue of lands in the said town.

Reserved lots may be located by the C. C. Pleas on application of Assessors, &c.

[Mass. Stat. Feb. 26, 1811.]

[See ch. 480, Vol. 8, p. 328.]

by a committee of 3 disinterested freeholders,

designating the several uses for which they were reserved in the grant.

SECT. 2. *Be it further enacted,* That the said committee previous to their proceeding to execute the warrant aforesaid, shall be sworn to the faithful discharge of their duty by any Justice of the Peace within said county, a certificate thereof to be made on the back of said warrant; and shall give notice of their appointment, and of the time and place of their meeting to execute said warrant, by causing the same to be published in one or more newspapers printed in the State, and by posting up written notifications in two or more public\* places within the town where said land lies, at least thirty days prior to their making the location aforesaid.

Committee to be sworn,

[Ib. § 2.]

and give notice.

Mode of giving notice.

[\*152]

SECT. 3. *Be it further enacted,* That the said committee shall make return of said warrant, under their hands and seals, or the hands and seals of a majority of them, with their doings therein, to said Circuit Court of Common Pleas,

Committee to make return of their doings.

[Ib. § 3.]

**CH. 42.**

Return accepted and recorded to be a legal assignment.

as soon as may be after their service is performed ; and the same being accepted by the said Court, and being recorded in the office of the Registry of Deeds in said county within six months from the date of the said return, shall be the legal assignment of the said lots to the several uses for which they were reserved.

Court may confirm lots to located proprietors.

[Ib. § 4.]

**SECT. 4.** *Be it further enacted,* That whenever any proprietor or proprietors of any grant of land shall locate such lots as may have been reserved for public uses, and make a return thereof to the said Circuit Court of Common Pleas, it shall be lawful for the said Court to confirm the same, and when so done, such lot shall be deemed legally located, and assigned for the uses intended and mentioned in the original grant of the same. [Approved March 15, 1821.]

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## Chapter 42.

AN ACT for the better securing, and rendering more effectual, Grants and Donations to Pious and Charitable uses (a).

Preamble.

[Mass. Stat.,  
Feb. 20, 1786,  
§ 1.]

**WHEREAS** many grants and donations have heretofore been made by sundry well disposed persons, in and by such expressions and terms as plainly show it was the intent and expectation of such grantors and donors, that their several grants and donations should take effect, so as that the estates granted should go in succession; but doubts have arisen in what cases such donations and grants may operate so as to go in succession, for ascertaining whereof:

Deacons of Protestant churches, not episcopal, and church wardens of episcopal churches, to be bodies corporate and take lands, &c. in succession, &c.

[\*153]

**SECT. 1.** *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That the deacons of all the several Protestant churches, not being episcopal churches, and the church wardens of the several episcopal churches, are, and shall be deemed so far bodies corporate, as to take in succession all grants and donations, whether real or personal made either to their several churches, the poor of their churches, or to them and their successors, and to sue and\* defend in all actions touching the same; and wherever the ministers, elders or vestry, shall in such original grants or donations have been joined with such deacons or church

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(a) This statute extends to the deacons of the societies of Shakers. *Anderson vs. Brock*, 3 Glf 248; *Richardson vs. Freeman & al.* 6 Glf. 57.

## CH. 42.

wardens as donees, or grantees in succession, in such cases, such officers and their successors together with the deacons or church wardens, shall be deemed the corporation for such purposes as aforesaid; and the minister or ministers of the several Protestant churches, of whatever denomination, are, and shall be deemed capable of taking in succession any parsonage land or lands, granted to the minister (b) and his successors, or to the use of the ministers; and of suing and defending all actions touching the same; saving that nothing in this act shall be construed to make void any final judgment of any court of common law or Probate; saving also that no alienation of any lands, belonging to churches hereafter made by the deacons, without the consent of the church, or a committee of the church for that purpose appointed, or by church wardens, without the consent of the vestry, shall be sufficient to pass the same; and that no alienation hereafter made by ministers of lands by them held in succession, shall be valid any longer than during such alienors continuing ministers unless such ministers be ministers of particular towns, districts or precincts, and make such alienation with their consent respectively; or unless such ministers so aliening be ministers of episcopal churches, and the same be done with the consent of the vestry; and the several churches in this State, not being episcopal churches, are hereby empowered to choose a committee to call the deacons or other church officers to an account; and if need be, commence and prosecute any suits touching the same, and also to advise and assist such deacons in the administration of the affairs aforesaid (c).

Ministers of all Protestant churches may take lands, &c. in succession granted to the ministry or use of the ministry.

How alienations of such property must be made to be legal and effectual.

(b) 1. A donation of lands to the use of the ministry has the same import, within the meaning of this statute, as a donation of parsonage lands to the use of the minister or ministers. *Brown vs. Porter*, 10 Mass. 97.

2. The estate in land appropriated to the benefit of a parish or religious society, remains with the residue of the original parish or society, and is not in any manner transferred or distributed by a separation, a change among the members or in the territorial limits of the corporation. *Ib. & Parish in Brunswick, vs. Dunning & als.* 7 Mass. 445; *First Parish in Shapleigh vs. Gilman*, 13 Mass. 190; *Baker & al. vs. Fales*, 16 Mass. 488.

(c) 1. Parsonage lands are holden by the minister in right of his parish; and in case of his death, &c. the fee is in abeyance until there be a successor. *Weston vs. Hunt*, 2 Mass. 500.

CH. 43. **SECT. 2.** *Be it further enacted,* That the income of the grants made, or to be made to any one such body politic for pious and charitable uses, shall not exceed the sum of six hundred dollars per annum. [Approved March 2, 1821.]

Limitation of income. [lb. § 2.]

Additional Act, ch. 298, Vol. 3, p. 139.

[\*154]

**Chapter 43.\***

AN ACT for the better managing Lands, Wharves and other real estate, lying in common.

**SECT. 1.** *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That when and so often, as any five, or a major part of the proprietors of lands (a), wharves, or other real estate lying in common, in any part of this State, shall judge a proprietors' meeting to be necessary, they may make a written application to a Justice of the Peace through the State, or to a Justice of the Peace within the county where such estate lies, for a warrant for the calling of a meeting, expressing the time, place and occasion thereof; and such Justice is hereby empowered to grant a warrant for such meeting accordingly, directed to one of the proprietors asking the same, or to the proprietors' clerk, requiring him to notify the proprietors of the meeting, and the time, place and occasion of the same; which notification, in case such estate lies in any incorporated town, shall be given in writing and posted up in some public place or

Any five proprietors may apply to a Justice to call a meeting—

[Mass. Stat. Mar. 10, 1784, § 1.]

either a Justice through the State, or of the county where the lands lie.

Such Justice may issue warrant to one of the proprietors to notify it to be holden at the time and place requested.

2. The parish is entitled to the profits during a vacancy. *Ib.*

3. If the minister aliene with the assent of the parish, it shall bind his successor; if without such assent, it will be valid during his incumbency, and his successor may enter without action, or he may bring his writ of entry *sine assensu Parochiæ*, counting on the seizin of his predecessor within 50 years. A minister may also have his writ of right, on his own seizin within 30 years, or on the seizin of his predecessor within 60 years. *Ib.*

4. An alienation by the parish is void. *Ib.*

(a) Whether proprietors of land granted by the State, but not yet located in any particular county, can, prior to such location, act as a corporation under this act. *Quere. Innman & als. vs. Jackson, 4 Glf. 237.*

places within such town fourteen days at least before the day appointed for the meeting, and for the like time before such meeting shall be advertised in one of the Portland newspapers, and in one of the newspapers (if such there be) printed in the county wherein such real estate lies ; or in case such estate doth not, or shall not lie within any incorporated town, such written notification shall be given by advertising the same in any two of the said Portland newspapers and in one other newspaper, (if such there be) printed out of Portland in the county where such estate lies, at least four weeks successively before such meeting ; or such meetings may be otherwise warned by posting up written notifications in some public place in each and every town and plantation where any one or more of the said proprietors may reside, fourteen days at least before the time appointed for holding such meeting ; and such and so many of the proprietors as shall assemble personally, or by their attornies, and meet accordingly, shall have power by a major vote to choose a moderator, a clerk, a treasurer,\* a collector or collectors of taxes, a committee or committees, and any other needful officers to manage their affairs ; which clerk shall enter and record all votes and orders that from time to time shall be made and passed in the proprietors' meetings, who shall be sworn to the faithful discharge of his office ; and to agree upon and appoint any other way or method of calling and summoning meetings for the future, that shall be most suitable and convenient to the proprietors ; and also to pass votes or orders for the settling, or encouraging the settling, managing, improving, or dividing such common lands, wharves or other real estate not before severed and divided ; and to annex penalties to the breach and non observance of such orders : *Provided*, such penalty doth not exceed three dollars for one offence : *Provided also*, that such orders so made, with penalties, annexed to them, be allowed and approved by the Court of Sessions for the county where such land or estate lies, and be not repugnant to the general laws of this State ; in which case such orders shall have such force and effect as that such proprietors by their treasurer, agent or agents, may recover the penalty thereto annexed against the breakers

## CH. 43.

Manner in  
which notice  
is to be given.

What measures the proprietors may adopt when met.

[\*155]

**CH. 43.** or non observers thereof, in any Court proper to try the same ; such penalty to be disposed of as the proprietors shall direct. And the votes shall always be collected and numbered according to the interest of the proprietors present where the same is known. And no other affair shall be acted on at any meeting of the proprietors, than what is expressed in the warrant or notification for such meeting (b).

Proprietors to vote according to interest.

No business to be acted upon, unless in the warrant.

**SECT. 2.** *Be it further enacted,* That the moderator, chosen at any such meeting, shall be thereby empowered to manage and regulate the business of that meeting. And where it shall so happen that any matter remains doubtful after a vote, the moderator is hereby directed and required to cause the same to be decided by the poll, if any one or more desire it ; such polls to be numbered according to their interest.

Power of the Moderator.

[Ib. § 2.]

Proprietors may prosecute and defend suits by agents and attorneys;

[Ib. § 4.]

[\*156]

**SECT. 3.** *Be it further enacted,* That it shall and may be lawful for all proprietors in common and undivided lands, grants and other real estate, or interests whatsoever, to sue, commence and prosecute any suits or actions in any Court proper\* to try the same, either by themselves, or their agents, or attorneys ; and in like manner to defend all such suits and actions as shall be commenced against them or any of them.

**SECT. 4.** *Be it further enacted,* That it shall and may be lawful to and for the proprietors of any common and undivided lands or other real estate, or the major part of them according to the interest of the proprietors present, by themselves or their lawful attorneys, at any legal meeting to vote, grant or order the raising of any suitable sum or sums of money, that shall by them be thought sufficient for bringing forward, completing the settlement of, or managing or improving such lands and estate, and to carry on and prosecute or defend any actions or suits that may be brought by

—and at any legal meeting may raise monies for the purposes of the propriety;

[Ib. § 5.]

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(b) The subject of an article, in such warrant, is not disposed of by a single vote on the first day of the corporate meeting ; and unless the rights of third persons are affected, whatever might have been done with it on the first day of the meeting, may be done on the days of adjournment, either by reconsidering or modifying former votes. And these principles apply to corporate meetings generally. *Farrer vs. Perley*, 7 Glf. 410.

or against them ; or for carrying on, managing, or effecting any other affair for the common good of such proprietors ; and to levy and apportion such sum or sums (raised for the ends and uses aforesaid) upon the proprietors' several rights in such common and undivided lands or estates, equally and ratably, according to their several interests therein. And every proprietor who shall neglect to pay to the collector or treasurer, or committee of such propriety, his proportion of such sum or sums of money as have been, or from time to time shall be duly granted and voted to be raised and levied upon the proprietors' rights and shares in such lands (c) and estates, for the space of six months, with respect to those who live within this State, and twelve months with respect to those who live out of it, after such grant, and his or their proportion thereof shall have been posted and published in the several newspapers as in the case of notifications as aforesaid, then the committee of the proprietors, or the major part of such committee, may, and are hereby fully empowered from time to time, at a public vendue, to sell and convey away so much of such delinquent proprietors' right or share in such common land or estate as will be sufficient to pay and satisfy his tax or proportion of such grant, and all reasonable charges attending such sale, to any person that will give most for the same, notice of such sale and of the time and place thereof being given by posting as aforesaid, and publishing the same in at least two of the newspapers aforesaid,\* five weeks successively before the time of such sale ; and may execute a good deed or deeds of conveyance of the lands or estate so sold unto the purchaser thereof, to hold in fee simple : *Provided nevertheless*, That the proprietor or proprietors whose right or share shall be so sold, shall have liberty to redeem the same at any time within twelve months after such sale, by paying the sum such right or share sold for, and charges, together with the further sum of twelve dollars for each hundred dollars produced by such sale, and so *pro rata* for any less or greater sum.

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and assess the proprietary rights in common.

If assessments are not paid within the times appointed,

and after due notice,

Committee may sell at auction so much as necessary of delinquent proprietors' rights, &c.

Notice of such sale being previously given. Mode of notice.

[\*157]

Committee may give deeds, &c.

Proprietor may redeem within twelve months.

Terms of redemption.

(c) Lots holden in severalty by the assignees of undivided proprietors, are not included in this provision. *Bott vs. Perley*, 11 Mass. 169.



CH. 43. SECT. 5. *Be it further enacted*, That the treasurer, assessors, collector or collectors, which at any time may be chosen by the proprietors of any common and undivided lands or other real estate, shall be sworn before a Justice of the Peace to the faithful discharge of their respective trusts, and in case no Justice of the Peace shall be present at the meeting of such proprietors, then any, or all the officers directed to be sworn by this act, may be sworn by the moderator ; and such treasurer is hereby empowered to demand, sue for, recover and receive all such sums of money, debts and dues, as shall at any time belong to the said proprietors, or be any ways due or coming to them, and make payment thereof according as he shall be lawfully ordered and directed by the proprietors, and render his reasonable account thereof on demand ; and such treasurer shall continue in his office till the proprietors shall see cause to choose another.

Treasurer, Assessors, and Collectors to be sworn.

[Ib. § 7.]

Treasurer may collect debts due proprietors, &c.

Proprietors may divide & dispose of their lands, &c.

[Ib. § 8.]

Proprietor may vote by attorney.

[\*158]

Saving as to meetings holden by adjournment.

SECT. 6. *Be it further enacted*, That the proprietors of such undivided land or estate, where the same hath been heretofore stated and each one's proportion known, shall be, and hereby are empowered to order, manage, improve, divide (d), or dispose of (e) the same in such way and manner as shall be concluded and agreed upon by the major part of the interested present at any legal meeting, the votes to be collected and accounted according to the interest. And any proprietor may vote as well by attorney specially appointed for that purpose, as in person : And the proprietors of all such undivided lands and estate not stated, nor the proportions known as aforesaid, shall be, and hereby are empowered to order, manage, improve, divide or dispose of the same, as hath been or shall be concluded and agreed on by the major\* part in number of such proprietors present at any such meeting : *Provided always*, That the meetings of proprietors that may be notified, or which may hereafter be held by adjournment or adjournments agreeable to former laws, shall not be affected by the passing of this act : But

(d) *Folger vs. Mitchell & al.* 3 Pick. 396.

(e) In the power to *dispose of*, is included a power to sell and convey. *Rogers vs Goodwin*, 2 Mass. 477.

such meetings and the transactions regularly made thereat shall be as valid to every intent and purpose as though this act had never been made.

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SECT. 7. *Be it further enacted*, That notwithstanding the final division of any lands, wharves or other real estate lying in common, and which had been, or shall have been held and improved as a proprietary, the last proprietors or holders in common, shall continue in their corporate capacity, until all debts and taxes due, to such proprietary, are collected and received, and until all their contracts and agreements, made prior to such final division, shall be performed; and are and shall be liable and capable, in and by the same name and capacity as before such division, to sue and be sued, and by their agents to pursue and defend, in all matters and demands respecting such proprietary, until final judgment and execution; and shall and may call and hold meetings, and choose all necessary officers, and may vote, assess, levy and collect all reasonable rates and assessments, in like manner, form and proportion as before such division such proprietary could or might have done: *Provided nevertheless*, That the proprietors aforesaid shall not continue to act in their corporate capacity for more than ten years after the final division of their lands or other real estate; nor shall any suit brought against them be sustained, unless commenced within six years from the time such right of action shall accrue; any thing in this act to the contrary notwithstanding.

After final division—last proprietors to continue a corporation, &c.

[Mass. Stat. Mar. 9, 1791, § 1.]

until their debts are paid and collected,

and be liable to be sued as before such division,

—may call and hold meetings and transact business—

Provided they shall not so continue to act more than ten years.

Proprietors may avail themselves of statute of limitations.

SECT. 8. *Be it further enacted*, That the last clerk chosen by the proprietors of any common and undivided land, or other real estate in this State who are or have been, or may hereafter be empowered by law to hold meetings, choose a clerk and other officers, shall continue to execute the office of clerk to which he was appointed, notwithstanding the final and total division of such lands and estate, as fully, to all intents, constructions and purposes whatsoever, as though there had\* been no such division made, and until the same records shall be lodged with the clerk of the town in which the land lies; and when the lands lie in several towns, they may be lodged with the clerk of such town, as the Court of Sessions,

Clerk last chosen to continue in office until records are lodged with town clerk.

[Mass. Stat. Mar. 10, 1794, § 9.]

[\*159]

When lands lie in several towns, Court of Sessions to decide with

CH. 44. upon application to them made for that purpose, shall order and direct ; and the clerk with whom they may be lodged, and his successors in office shall be fully authorized to authenticate any copies therefrom, as from the records of the town of which he is clerk.

what clerk they shall be lodged ; which clerk may certify copies thereof.

Proprietors may in certain cases recall their records—and cause clerk to make a record

[Mass. Stat. Mar. 9, 1791, § 2.]

SECT. 9. *Be it further enacted*, That where, after such final division of any lands or other real estate, which have been or shall have been held as a proprietary, the proprietors making such division have ordered and delivered or shall order and deliver the record of their proprietary into the custody of the town clerk in which such land or other real estate, or part thereof, may lie ; the proprietors who shall hold any meeting for the purposes before mentioned, may recall the said record, and may cause the clerk then appointed, and sworn, or the town clerk to whom such records, have been committed, to record all votes and proceedings which shall be had at any meeting as aforesaid and copies of the same may be certified as by law is provided for certifying any other part of such record. [Approved March 15, 1821.]

## Chapter 44.

AN ACT for regulating Fences, and general and common Fields.

Every town to choose annually fence viewers.

[Mass. Stat. Feb. 21, 1786, § 1.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That in every town within this State, there shall be chosen annually by the inhabitants thereof, at the time of their meeting for the choice of town officers, two or more judicious and discreet freeholders, being inhabitants of the same town, to be Fence Viewers, to be sworn as other town officers are sworn, to the faithful discharge of the duties of their office.

[Ib. § 2.]

SECT. 2. *Be it further enacted*, That all fences (a) of

(a) 1. The statutes made by the legislature are the foundation of all the obligations imposed on the citizens by law, to make and repair fences. *Rust vs. Low & al.* 6 Mass. 90.

2. See ch. 128, Vol. 2, and notes thereto.

four feet high, and in good repair, consisting of rails, timber, boards or stone walls ; and also brooks, rivers, ponds, creeks, ditches\* and hedges, or other matter or thing equivalent thereto, in the judgment of the Fence Viewers, within whose jurisdiction the same shall lie, shall be accounted legal and sufficient fences ; and the respective occupants of lands inclosed with fence, shall keep up and maintain partition fences between their and the next adjoining inclosures, in equal halves, so long as both parties continue to improve the same ; and in case either party shall neglect or refuse to repair or rebuild the fence, which of right he ought to maintain, the aggrieved party may forthwith apply to two or more Fence Viewers of such town, duly chosen and sworn, to survey the same ; and upon their determination that the fence is insufficient, they shall signify the same in writing, to the occupant of the land, and direct him to repair or rebuild the same within six days ; and if the same fence shall not be repaired or rebuilt within the said term of six days, it shall be lawful for the complainant, that improves the lands adjoining, to make up, amend or repair the deficiency ; and when the same shall be completed and adjudged sufficient by two or more of the Fence Viewers, and the value thereof, together with the Fence Viewers' fees ascertained in writing, the complainant shall have a right to demand and receive of the occupant, lessor or freeholder of the land where the fence was deficient, as aforesaid, at his election, double (b) the sum thus ascertained as aforesaid, for the expense of amending, surveying and viewing the fence ; and in case of neglect or refusal to make payment thereof, for the space of one calendar month after demand made of the person against whom he shall make his election, he may sue for and recover the same, by a special action of the case in any Court proper to try the same, and interest, one per cent. per month until judgment shall be rendered therefor.

SECT. 3. *Be it further enacted*, That when any dispute shall arise about the respective occupants' right in partition fences, and his or their obligation to maintain the same, upon

## CH. 44.

[\*160]  
What shall be considered as legal fences.

Occupants of adjoining inclosures to maintain partition fences.

[See additional act.]

Proceedings in case of neglect.

Party neglecting, to pay double the adjudged value,

and after one month liable to suit and 12 per cent. interest.

Fence viewers to assign in writing the shares of partition fences

(b) *Binney vs. Proprietors of undivided lands in Hull*, 5 *Pick.* 503.

**CH. 44.** application made by either party to two or more Fence Viewers of such town where the lands lie, they are hereby empowered, after due notice to each party, to attend at time and place, if they see cause, to assign (c) to each party his share\* thereof, in writing : which assignment, being recorded in the Town Clerk's office, shall be binding upon such persons and the succeeding occupiers of the respective lands, and they obliged always thereafter to maintain their part of said fence ; and in case any of the parties shall refuse, or neglect to erect, keep up and maintain the part to such party assigned, the same may be done by the aggrieved party, in the manner before in this act provided, and for which he shall be entitled to double the sum ascertained, in manner as aforesaid, and to be recovered in like manner. And all divisional fences between man and man shall be kept in good repair throughout the year, unless the occupiers of the lands on both sides shall otherwise agree (d).

**SECT. 4.** *Be it further enacted,* That when lands belonging to, or occupied by different persons, and subject to be fenced, are bounded upon, or divided from each other by any brook, pond or creek, which of itself is not a sufficient fence in the judgment of the Fence Viewers, and it is in their opinion impracticable, without unreasonable expense, for the partition fence to be made in the middle or other part thereof, being the true boundary line between them ; if, in such case the occupant of the land on one side shall refuse or neglect to join with the occupant of the land on the other side, in making a partition fence on one side or the other, or shall disagree respecting the same, then two or more Fence Viewers of the town or towns wherein such lands lie, on ap-

each occupant is to repair.

[Ib. § 3.]

[\*161]  
Assignment to be recorded.

Proceedings in case of refusal to build or repair.

Divisional fences to be kept in good repair unless otherwise agreed.

Fence viewers to decide in writing how or on which side of a stream a divisional fence shall be built.

[Ib. § 4.]

(c) If a part of a division fence be assigned to a party to keep in repair, it is his property, so far at least that the removal of it for lawful purposes cannot make him a trespasser; nor is there a joint tenancy or tenancy in common of the materials of which the fence is composed. *Burrell vs. Burrell*, 11 Mass. 294.

(d) When parties have agreed upon a fence variant from the line, avowedly for convenience, and shall have continued to claim according to the true line, neither party acquires a title, or even a right of possession, against the other, merely on account of the fence. *Burrell vs. Burrell*, 11 Mass. 298.

plication to them made, shall forthwith view such brook, river, pond or creek ; and if they shall determine the same not to answer the purpose of a sufficient fence, and that it is impracticable to fence at the true boundary line ; they shall judge and determine how, or on which side thereof the fence shall be set up and maintained, or whether partly on one side and partly on the other side, as to them shall appear just, and reduce such their determination to writing, having first given notice to the parties to be present at such assignment : and if either of the parties shall refuse or neglect to make up and maintain the part of the fence to such party belonging, according to the Fence Viewers' determination in writing, as aforesaid, the same may be done and performed, as in this act is before provided, and the delinquent\* party subject to the same costs and charges to be recovered in like manner.

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Proceedings in case of neglect to build fence accordingly.

[\*162]

SECT. 5. *Be it further enacted*, That where any lands belonging to two persons in severalty, shall have been improved in common, without a partition fence between them, and one of the occupants shall be desirous to improve his part in severalty, and the other occupant shall refuse or neglect, on demand to divide the line where the fence ought to be built, or to build a sufficient fence on his part of the line when divided, it shall be in the power of the party desiring it, to have the same divided and assigned by two or more of the Fence Viewers of the same town, in the way and manner in this act provided ; and the same Fence Viewers may, in writing, assign a reasonable time, having regard to the season of the year, for making up the fence ; and if the occupant complained of shall not build and erect his part of the fence within the time so assigned, it shall and may be lawful for the other party, after having made up his own part of the fence, to make up the other's part, and recover therefor double the sum it shall cost, with the fees of the Fence Viewers, in the way and manner in this act before provided.

When persons owning in *severalty* have improved in *common*, and one wishes to improve in *severalty*, what proceedings are to be had.

[Ib. § 5.]

SECT. 6. *Be it further enacted*, That when one party shall cease to improve his land, or shall lay his inclosure, before under improvement, in common, he shall not have a right to take away any part of the partition fence that to him be-

When one party ceases to improve his land, the partition fence shall remain.

**CH. 44.** longs (e), adjoining to the next inclosure that is improved :  
*Provided*, The party continuing to improve will allow and pay therefor, so much as two or more Fence Viewers shall, in writing determine the reasonable value thereof. And whenever any lands which have laid unimproved and in common, shall be afterwards inclosed or improved by depasturing, the occupant, lessor or freeholder thereof shall pay for the one half of each partition fence standing upon the divisional line between the same land and the land of the inclosures of any other occupant or proprietor, the value and part thereof to be ascertained, in writing, in case they shall not agree between themselves, by two or more of the Fence Viewers of the same town wherein such land lies ; and in case such occupant, lessor or proprietor as aforesaid, shall\* neglect or refuse to pay for a moiety of the partition fences, for the space of thirty days after demand made, the value having been ascertained as aforesaid, the proprietor of the fence may have and maintain in form aforesaid, an action of the case for such value and the costs of ascertaining the same. And in all cases where the line upon which partition fence is to be made or divided is the boundary line of one or more towns, or partly in one town and partly in another town, a Fence Viewer shall be taken from each town.

Where towns' lines, &c. are boundaries, a fence viewer to be taken from each town.

Water fences to be maintained equally by parties.

[Ib. § 7.]

Proviso as to house lots not exceeding half an acre.

**SECT. 7.** *Be it further enacted*, That when a water fence, or fence running into the water is necessary to be made, the same shall be done in equal halves, unless by the parties otherwise agreed : and in case either party shall refuse or neglect to make or maintain the share to such party belonging, similar proceedings shall be had, as in other cases of the like kind respecting fences out of the water, in this act mentioned : *Provided*, That nothing in this act contained shall extend to house lots, the contents of which do not exceed half an acre ; but if the owner or owners of such lots shall improve, his neighbor shall be compellable to make and maintain one half of the fence between them, whether he improve or not ; or to make void any written agreement respecting the making or maintaining partition fences.

[Ib. § 8.]

**SECT. 8.** *Be it further enacted*, That any Fence Viewer

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(e) See note c, p. 182, of this volume.

duly chosen and sworn, who, on due notice given him and being requested by any person interested to view any fence complained of, as insufficient, shall neglect forthwith to attend the same, shall forfeit and pay the sum of three dollars, to him or them who shall sue for the same, within forty days after such neglect, and each Fence Viewer shall be paid one dollar a day, fifty cents for half a day, and under that twenty five cents, for the time he shall be engaged in the business of his office, by the person employing him. And in case the complainant shall neglect to pay the Fence Viewers their legal fees, within thirty days after the service done, they may severally recover, by an action of the case, double the amount of such fees; and each Fence Viewer may be a witness for or against his companion in such suit.

CH. 44.

Penalty if  
fence viewers  
neglect their  
duty.

SECT. 9. *Be it further enacted*, That in any and every town\* or plantation in this State, where several allotments of lands are inclosed and fenced in one general field, or where they have been so inclosed, fenced and improved, or where all the proprietors of any land shall hereafter see cause to **inclose**, fence and improve the same in such manner, such proprietors may, some time in March annually, and from time to time, as they judge proper, meet together to make such rules and adopt such modes of improvement, as they shall think just and equitable and most for the general benefit; and the proprietor or proprietors of each lot respectively, during the time of his or their pasturing, planting, mowing or otherwise improving his or their part in such general field, shall make and maintain his or their respective part of the whole fence, according to the quantity of acres of land contained in his or their allotment, until the major part of the propriety, at a meeting of such proprietors legally warned for that purpose, shall see cause to alter the form of their improvement. And the whole general fence shall be measured, and each proprietor's part set out and apportioned by two or three discreet indifferent persons, appointed and sworn for that purpose, by any Justice of the Peace for the said county, unless the major part of the propriety agree, and proportion the same among themselves. And when the proportion of each proprietor in such general fence is adjusted and de-

[\*164]

Proprietors of  
general and  
common fields  
may have an-  
nual meetings  
in March, and  
agree on mode  
of improving,  
&c.

[Mass. Stat.  
Feb. 24, 1796,  
§ 1.]

Each proprie-  
tor's propor-  
tion being de-  
termined, to  
be recorded.



**CH. 44.** terminated, the same shall be entered upon record by the Clerk of the propriety ; and where there is no such Clerk, by the Clerk of the town wherein the land lies, any law, usage or custom to the contrary notwithstanding. And the charge arising by dividing and setting off the several parts of such fence, to and among the proprietors of lands inclosed and fenced in one general field, and also the charge of making and maintaining of such fence, as cannot justly be set off to any particular proprietor or proprietors, as his or their part, shall be borne by the several proprietors, in proportion to their respective interests in such field.

Expense to be borne by proprietors in proportion, &c.

Proceedings when fence round a common field is deficient, &c.

[\*165]

[Mass. Stat. Feb. 24, 1796, § 1.]

**SECT. 10.** *Be it further enacted,* That whenever the fence around any general and common field, belonging to any freeholder, occupant, or improver of any land in such field, shall become deficient and need repairing, the owner thereof shall immediately repair such defective fence, after being duly notified\* of such deficiency by any Fence Viewer of the town wherein such field lieth ; and in case the owner thereof shall neglect to repair such defective fence, for the space of three days, after due notice given thereof by any Fence Viewer as aforesaid, it shall and may be lawful for any freeholder or occupier of any lands in such fields, to repair such defective fence ; and when the same shall be completed and adjudged sufficient, by two or more of the Fence Viewers of the town wherein such fence lieth, and the value thereof, together with the Fence Viewers' fees, ascertained in writing, by them subscribed, the person who shall make up or repair such deficient fence, shall have right to demand and receive of the occupier, lessor or freeholder of the land, who ought to make up or repair the same, at his election, double the expense of making or repairing, surveying and viewing, such fence ; and in case of neglect or refusal to make payment thereof for the space of one month, after notice and demand made of the person against whom he shall make his election, to satisfy him therefor, he may sue for and recover the same by a special action of the case, with cost of suit, in any Court proper to try the same. And whereas it often happens that fences around general and common fields are blown down, carried away, or otherwise destroyed by sudden floods or tempests, and it is necessary the same should be

immediately repaired to prevent the destruction of the grain and crops growing therein : CH. 44.

SECT. 11. *Be it therefore enacted*, That whenever any such fence shall be thus suddenly blown down, carried away, or destroyed, and the crops of grain or grass therein growing, shall be thereby exposed to be immediately destroyed, the occupant or freeholder of the same, to whom the same fence belonged to repair, shall immediately repair the same ; and in case of neglect for the space of twenty-four hours, after notice given him thereof by any Fence Viewer as aforesaid, it shall and may be lawful for any freeholder or occupier of any lands in such fields, to set up and sufficiently repair such fence : and when the same shall be completed and adjudged sufficient by two Fence Viewers or more, as aforesaid, and the value thereof, together with the Fence Viewers' fees, ascertained in writing as aforesaid, the person who shall\* set up or repair the same, shall have right to demand and receive of the occupier, lessor or freeholder of the land, who ought to make up and repair such fence, at his election, double the sum thus ascertained as aforesaid, for the expense of setting up, repairing, surveying and viewing the same ; and in case of neglect or refusal to make payment thereof, for the space of one month as aforesaid, after demand made of the person against whom he shall make his election to receive the same, he may sue for and recover the same, with costs of suit, in manner as is before directed.

Proceedings when fences round common fields are blown down, &c.

[Ib. § 2.]

[\*186]

SECT. 12. *Be it further enacted*, That any person now owning, or who may hereafter own any lands lying within the limits of any general and common field within this State, shall have the right to inclose his own land, at his own expense ; and at all seasons of the year, to have the exclusive and separate right of using and improving his own land so inclosed with a good and sufficient fence ; *Provided*, That such proprietor shall be held to maintain his proportion of the general fence around said field.

Any person owning lands in a general field, may inclose the same at his own expense.

[Mass. Stat. June 15, 1796.]

Provided.

SECT. 13. *Be it further enacted*, That for the better enabling such proprietors to call a meeting for the ends aforesaid, it shall be in the power of any Justice of the Peace for the county where such lands lie, upon application to him

Mode of calling meetings of proprietors of general fields.

**CH. 44.** made by any two of the proprietors of such general fields, to issue out a warrant for such meeting ; which warrant, and also the notification of the meeting, shall express the business thereof, and shall be directed to one of the proprietors asking the same, or to the proprietors' Clerk, requiring him to notify the proprietors of the meeting, and the time, place and occasion of the same ; which notification, in case such field lies in any incorporated town, shall be given in writing to each proprietor therein, or posted up in some public place or places within such town, fourteen days, at least, before the day appointed for such meeting, or in case any of the proprietors do not reside in said town, the notification shall, for the like time be advertised in any two of the Portland newspapers, and in one other newspaper (if such there be) printed in the county where such estate lies, at least four weeks successively before such meeting ; or such meetings may be otherwise warned by posting up written notifications in\* some public place in each and every town and plantation where any one or more of the said proprietors may reside, fourteen days at least before the time appointed for holding such meeting.

[Mass. Stat.  
Feb. 24, 1786,  
§ 1.]

[\*167]

Proprietors at  
such meetings  
may raise  
money, elect  
officers, &c.

[Mass. Stat.,  
Feb. 24, 1786,  
§ 3.]

**SECT. 14.** *Be it further enacted,* That the proprietors of such general fields respectively shall be and are hereby fully authorized and empowered, in a proprietors' meeting for that purpose regularly convened, by a major vote of the proprietors then present, (the vote to be collected according to the interest of the proprietors) to agree upon and pass one or more votes for the raising and collecting such sum or sums of money from time to time, as they shall judge necessary for defraying the charges aforesaid, and for carrying on, or managing any common affairs relating to such proprietors ; and that they be alike empowered to choose three or five assessors for the assessing and apportioning such sum or sums so agreed on, and voted upon the proprietors of such fields, according to their several interests therein ; and to appoint a collector or collectors to gather in and collect the same ; which collector or collectors shall be, and are hereby fully empowered to levy and collect the sum or sums, so set and apportioned for such proprietors to pay, in the same manner

## CH. 44.

as constables of towns within this State are empowered to levy and collect the public rates or taxes ; and to pay in the same to the proprietors or their Clerk, who is hereby empowered to grant warrants, for the levying and collecting such assessment at such time as shall be by them appointed for the payment thereof : and such Clerk shall be accountable to the proprietors therefor ; the person or persons so assessing the said proprietors, and the collector or collectors that shall be so appointed for the gathering and collecting the sum or sums so granted and agreed upon by the said proprietors to be assessed and collected as aforesaid, shall be under oath for the true and faithful performance of their services respectively ; which oath shall be administered to them as the law provides for swearing town officers : *Provided nevertheless*, That any such proprietor, who apprehends himself aggrieved, or over-rated in the making or apportioning such assessment, shall have liberty to apply to the Justices of the Court of Sessions in the respective counties, where such fields\* lie, for relief ; and in such case the said Justices are hereby fully empowered to grant relief accordingly ; and their judgment shall be final.

[\*168]

SECT. 15. *Be it further enacted*, That the proprietors aforesaid, or the major part of such of them as shall be present at a meeting legally warned for that purpose may choose Hay Wards or Field Drivers, who shall be under oath, and shall have the same powers as if they had been chosen by a town.

May choose  
hay wards and  
field drivers—  
who are to be  
sworn.

[Ib. § 4.]

SECT. 16. *Be it further enacted*, That if any proprietor in any common or general field shall put, or cause to be put therein any horse, cattle, sheep or other creature, over and above the number allowed him, or before the day agreed upon ; or keep them longer there than the time set and limited by a major vote of the proprietors, he shall be deemed a trespasser ; and his creatures so put in shall be proceeded with by any of the proprietors as creatures taken damage feasant, to all intents and purposes, as much as if he owned no land within such general field.

Penalty for  
putting cattle  
&c. into such  
fields, before  
the time ap-  
pointed ; or  
more than  
their propor-  
tion.

[Ib. § 5.]

SECT. 17. *Be it further enacted*, That when and so often as any trespass or trespasses, shall be done in any com-

[Ib. § 6.]

**CH. 44.** mon or general field, by reason of the insufficiency of the fence belonging to any person owning the adjoining land, the party or parties injured shall forthwith procure two sufficient persons of good repute to view and adjudge of the damage done, giving notice of such trespass to the owner or claimer of the horse, cattle, sheep or other creature, that did the same (if he be known and resident in the same town, or near thereto) that he may be present, and nominate one of the appraisers of such damage, if he see cause: and the damage shall be answered according to such appointment. And where damage happens through the insufficiency of the fence, the owner or occupant of the land to which the defective fence belongs, shall be liable to answer and make good all such damage.

Mode of estimating damages done, or trespasses, &c.

Lines to be run and boundaries marked once in two years.

[Ib. § 7.]

[\*169]

Penalty for neglect.

Proprietors may dissolve and discontinue such general field.

[Ib. § 8.]

Proviso.

[Ib. § 9.]

[Ib. § 10.]

**SECT. 18.** *Be it further enacted,* That each proprietor of lands lying unfenced, or in any common field, shall, once in two years, on six or more days warning, previously given him by the proprietor or proprietors of the land next adjoining\*, run the lines, and make or keep up the boundaries between their respective lands, by sufficient mete stones, on pain that every party so neglecting or refusing shall forfeit the sum of two dollars to the party moving or requesting to run the line; the conviction of such neglect or refusal being had before any Justice of the Peace within the same county who is hereby empowered to hear and determine the case.

**SECT. 19.** *Be it further enacted,* That it shall and may be lawful to and for the proprietors who own the major part of the interest or property in any common or general field, at a legal meeting to be warned for that purpose, to dissolve and discontinue such field; six months being allowed to elapse before such discontinuation.

**SECT. 20.** *Provided always, and be it further enacted,* That nothing contained in this act shall prevent or hinder the proprietors of any such common field already fenced, from making and maintaining their fences according to rules and orders formerly agreed on by them at any meeting legally warned.

**SECT. 21.** *Be it further enacted,* That at every meeting of such proprietors the votes shall, by the Moderator, be col-

lected and counted according to the interests of the proprietors present, where such interests are known. And whereas it often happens that horses, cattle, and other creatures are clandestinely turned into general fields, or, being unruly, break into the same in places where the fence is good and sufficient according to law; and when, in such cases, proprietors of general fields, impound horses, cattle or other creatures, the owners replevy them because the fence inclosing the general field is deficient in some distant place from that where the horses, cattle or other creature entered the same, and in consideration of such deficiency judgment is unreasonably recovered against such proprietors:

CH. 44.

Proprietors to vote in their meetings according to their interest.

SECT. 22. *Be it therefore further enacted*, That whenever horses, cattle or other creatures, shall be clandestinely turned into any general field, or, being unruly, break into the same, and shall be taken and impounded by a proprietor thereof and a writ of replevin shall be purchased by the owner of the horses, cattle or other creatures so impounded, for\* the purpose of replevying them, it shall be in the power of the Court or Justice, before whom the action shall be brought, to give judgment in favour of the proprietor of the general field, upon his producing satisfactory evidence to the said Court or Justice, that the horses, cattle or other creatures replevied as aforesaid, were either clandestinely turned into the general field, or broke into the same in a part thereof, where the fence was good and sufficient according to law, some other parts of the fence inclosing the general field being deficient, notwithstanding: And whereas it often happens in fencing general fields, for the conveniency of fencing considerable quantities of rocky and barren land not capable of tillage, are taken into such fields, the owners of which may be obliged to make fence, and also pay taxes equally with the other proprietors whenever an assessment is made by the proprietors of such field; which is very unjust:

Damages may be recovered if cattle are clandestinely turned in, or break in where the fence is good; although other parts of the fence be deficient.

[\*170]

[1b. § 11.]

SECT. 23. *Be it therefore further enacted*, That all lands now lying in general fields, or that hereafter, may be taken into the same, that are so rocky or barren that the owners thereof have never improved them, either by mowing, ploughing, or feeding, such owners shall not be obliged to make, on

Barren and rocky lands to be excluded in estimating expenses of fences, and from taxes.

**CH. 44.** account of such lands, any part of the fence in compassing such general fields ; nor shall they be taxed for them in any rate or tax, raised by the proprietors of such field, until they shall make improvement thereon. And whereas the minor part of the owners or proprietors of common fields, in some instances, have been and may be desirous of a partition of such field into two or more distinct fields, from a persuasion that their shares or lots might (if separated and fenced off from the rest) be improved much more to their advantage, in some manner different from that agreed on by the majority : To the end therefore that such of the owners as are or may be so minded, may not be unreasonably restrained by the rest from having such partition :

[Ib. § 12.]

When 3 or more owners in general field wish to improve their lots separate from the general field; proceedings in such cases.

[\*171]

[Ib. § 13.]

Case of proprietors refusing.

Court of Sessions to appoint a Committee to make partition.

**SECT. 24.** *Be it enacted,* That when any three or more of the owners or proprietors of lots in any common or general field, lying within one general fence or inclosure, shall make application, in writing, under their hands to the proprietors of such field, (at any meeting legally warned for that\* purpose) to have the lots or shares of the owners or proprietors so applying, or theirs with other lots or shares (taken together) to make one entire field, to be separated from the rest by one common fence, and to be improved as a distinct and separate, but common field ; in such case, if the proprietors, who have the greater part of the interest among those who are present at such meeting, shall withhold or refuse their assent to such division or partition, it shall and may be lawful for the Justices of the Court of Sessions for the said county, upon application made to them, to appoint a committee of five freeholders within the said county (under oath) to make the partition prayed for, if it shall appear to such committee to be expedient, and to assign to each field its part or proportion of the divisional fence in consequence of such partition, to be made, kept up and maintained by the proprietors of the respective common fields ; and the return being made under the hands of the major part of such committee, and accepted by the said Court of Sessions, the fields so separated shall be considered as distinct and separate common fields, and the owners or proprietors of each field a distinct and separate propriety, as fully to all intents and purposes whatsoever.

er, as the owners or proprietors of such general field were considered before such partition was made : *Provided*, That no order for partition be made, or committee appointed, until the rest of the proprietors have been duly notified of such application, and opportunity given them to make their objections thereunto ; which notice shall be given by serving the Clerk of such proprietors with a copy of such written application, thirty days at least before such order or appointment be made ; and every committee that shall be appointed and employed as aforesaid, shall make return of their doings, in writing, under their hands, unto the said Court, as soon after as may be, for acceptance and confirmation : and the proprietors, whose interest shall be so set off, as well as the remaining proprietors, shall have and enjoy all the powers and privileges which the proprietors of general fields are by law vested with.

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Proviso for notice to the proprietors.

SECT. 25. *Be it further enacted*, That when the major part, in interest, of the proprietors of any tract of land, consisting of\* several allotments, shall be desirous of inclosing, fencing and improving the same in one general field, they may apply to the Circuit Court of Common Pleas in the county where such land lies ; and when such land lies in different counties, then to the Supreme Judicial Court to be holden in either ; and on such application the said Court shall notify the proprietors concerned in said land to appear at the same Court, at the same or the next term thereof, in such manner and form as the Court shall judge proper ; and if on hearing the said proprietors, it shall be deemed for their general benefit by the said Court, they shall decide that such land shall be fenced, inclosed and improved in one general field ; and after such tract of land shall be so established as a general field, the first meeting of the proprietors may be called, on application to a Justice of the Peace, in the manner provided by this act, at any time in the year ; and at such first meeting, the proprietors of such field may agree upon the manner of calling and notifying future meetings, as well the annual as special meetings, of such proprietors ; and such proprietors shall be entitled to all the rights and privileges, and subject

[\*172]  
When major part of the proprietors of a tract of land, consisting of several allotments, wish to inclose the whole in a general field—what proceedings are to be had.

[Mass. Stat. June 12, 1818.]



CH. 45. to all the duties, to which proprietors of general and common fields are. [Approved February 24, 1821.]

Additional Act, ch. 232, Vol. 3, p. 62.

## Chapter 45.

AN ACT for the support and regulation of Mills.

Owners of water mills built on their own land, &c. may raise a sufficient head of water, paying damages, &c.

[Mass. Stat. Feb. 27, 1796, § 1.]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That where any person hath already erected, or shall erect any water mill, on his own land, or on the land of any other person, by his consent legally obtained, and to the working of such mill it shall be found necessary to raise a suitable head of water ; and in so doing any lands shall be flowed not belonging to the owner of such mill, it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage, in the manner and on the terms herein after mentioned (a).

(a) 1. In proceedings under this statute and the additional act, the respondent may plead any matter shewing sufficient cause why further proceedings should not be had, though such plea be not enumerated therein. *Axtell vs. Coombs, et al.* 4 Glf. 322.

2. The right to flow the lands of another, in order to raise water sufficient to carry a mill, subject to the claim for damages, is given, by necessary implication, in this statute, and therefore needs not to be proved by writing, under the statute of frauds. *Clement vs. Durgin*, 5 Glf. 9.

3. This act does not provide for the acquiring of property in the land of another by parole, for the purpose of erecting or carrying on a mill; but it has merely superadded the right of flowing land, upon compensation, according to the statute, by those who have legally obtained the right to build a mill. *Cook vs. Stearns*, 11 Mass. 533.

4. Since the statute of Feb. 27, 1796 was enacted, no action at common law lies against the owner of a mill for flowing the land of another, unless after a judgment under the statute, he refuses to give security to the complainant for the yearly damages ascertained, or shall flow the land at a season of the year determined by the jury to be unseasonable. *Stowell vs. Flagg*, 11 Mass. 364.

SECT. 2\*. *Be it further enacted*, That if any person shall sustain damages in his lands by their being flowed as aforesaid, he may complain (*b*) to the Circuit Court of Common Pleas of the county wherein the lands so flowed, shall be situated; and the said Court shall order the complainant to notify the owner or occupant of the mill complained of, by serving him with an attested copy of such complaint, (together with such order thereon) fourteen days at least before the then next term of said Court, that he may then appear and show cause, if any he have, why a warrant should not issue in the manner, and for the purposes prayed for in such complaint; or such complainant, may fourteen days at least before the sitting of the Court, to which he intends to prefer his complaint, cause the owner or occupant of such mill to be served with an attested copy of such complaint.—And such service or notification, certified by the proper officer, shall be deemed sufficient evidence of proper notice.

SECT. 3. *Be it further enacted*, That if any owner or occupant of any mill shall plead (*c*) to such complaint, and in his plea shall deny the complainant's title to the lands said to be damaged by flowing, or shall claim a right to flow such lands without payment of damages(*d*), or for an agreed com-

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[\*173]

Person injured may complain to C. C. Com. Pleas.

[Mass. Stat. Feb. 28, 1798.]

Proceedings on complaint,

[See additional act.]

or complainant may 14 days before Court cause owner to be notified.

Mode of notifying.

If certain facts stated in the complaint be disputed—trial to be had in Court.

[Ib. § 2.]

(*b*) 1. This remedy does not lie for a town, against one who has flowed a town road. The remedy in such case, is by special action on the case. *Calais vs. Dyer*, 7 Glf. 155.

2. But it seems that it does lie for one who has only a private easement in the land; and also for a tenant for years. *Ib.*

3. A general description in the complaint, of the land flowed, is sufficient. *Com. vs. Ellis*, 11 Mass. 462.

(*c*) 1. The pleas stated in § 3, cannot be considered as designed to exclude others which show the complaint unfounded, and which are not subjected to the examination of commissioners; but any plea showing sufficient cause why further proceedings should not be had, is admissible. *Axtell vs. Coombs & al.* 4 Glf. 322; see *Slack vs. Lyon et al.* 9 Pick. 62.

2. See note *a* 1, to this chapter; also, *Vandersen vs. Comstock*, 8 Mass. 184.

(*d*) 1. The damages are to be assessed for the injury preceding as well as succeeding the time of instituting the process. *Ib. and Com. vs. Ellis*, 11 Mass. 462; see *Staple vs. Spring & als.* 10 Mass. 72; also, *Avery vs.*

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position ; the Court shall order a trial of the issue which may be joined by the parties, by a jury at the bar of said Court ; or if the issue be an issue in law, shall determine the same themselves, reserving to each party the liberty of appealing (e) to the Supreme Judicial Court, as in other cases.

[Mass. Stat.  
Feb. 27, 1796,  
& Mar. 2,  
1815.]

[\*174]

[Mass. Stat.  
Feb. 26, 1796,  
§ 2 & 4.]

[\*175]

Such verdict  
or report to be  
the measure of  
yearly dam-  
ages till altered.

[Mass. Stat.  
Feb. 27, 1796,  
§ 8.]

Who may  
have an action  
of debt for  
such damages.

Costs, how  
taxed.

SECT. 4. [Repealed, by ch. 261, Vol. 3, p. 90.

It provided for empannelling a jury, to estimate damages done by flowing, and also to determine what portion of the year (f) the lands ought not to be flowed ; with directions for the proceedings of the jury.\*]

SECT. 5. [Repealed, by ch. 261, Vol. 3, p. 90.

It provided, that parties to complaints above mentioned, may agree on a committee, instead of a jury, with similar powers, and to proceed in same manner as jury.\*]

SECT. 6. *Be it further enacted*, That such verdict or report and judgment thereon so recorded, shall be the measure of the yearly damages, until the owner or occupant of such mill, or the owner or occupant of such lands so flowed, shall on a new complaint to the said Court of the county, and by the form of process before prescribed, obtain an increase or decrease of the said damages. And the party entitled to any such yearly damages, whether the party to the record, his heirs, executors, administrators, or assigns may have an action of debt, grounded on such record, to recover the same. And the party prevailing in any complaint or action aforesaid, shall be allowed his full legal costs, though the damages so assessed or debt recovered shall not amount to the sum of twenty dollars (g).

*Van Denson*, 5 Pick. 184 ; *Wolcott W. M. C. vs. Upham*, 5 Pick. 292 ; *Thompson vs. Crocker*, 9 Pick. 604.

2. Damages may be barred, or relinquished by parol. *Clement vs. Durgin*, 5 Glf. 9.

3. See *Vandersen vs. Comstock*, 3 Mass. 184.

(e) No appeal lies from the judgment of the C. C. Pleas, unless the respondent, in his plea, either denies the title of the complainant to the lands flowed, or claims the right to flow them without the payment of damages, or for an agreed composition. *Lowell vs. Spring*, 6 Mass. 399 ; *Crowell vs. G. F. M. Company*, 6 Glf. 282.

(f) *Vandersen vs. Comstock*, 3 Mass. 187.

(g) 1. No execution issues, nor can *scire facias* be sustained on such record, for the yearly damages. The settlement runs with the land, and is

SECT. 7. *Be it further enacted*, That if any person, whose lands shall be flowed as aforesaid, shall, on his filing his complaint for ascertaining or increasing his damages, or on bringing his action of debt as aforesaid, move the said Court to direct the owner or occupant of such mill to give security for the payment of the said damages from time to time; as they shall become due; and in that case, the said owner or occupant of such mill shall neglect or refuse to give such reasonable security as the said Court shall order, he shall have no benefit of this act, but shall be liable to be sued for so flowing the lands of the complainant or plaintiff, in the same manner as though this act had not been passed.

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If on motion of party injured, owner of mill will not give security for such damages, he is to have no benefit of this Act.

[Ib. § 4.]

SECT. 8. *Be it further enacted*, That if the complainant shall fail to prosecute his complaint, in any stage of the proceedings, or the issue joined shall be determined against him, the respondent shall recover his costs as in other cases.

Costs for respondent when prevailing.

[Mass. Stat. Feb. 28, 1798, § 2.]

SECT. 9. *Be it further enacted*, That the owner or occupant of any mill dam may tender to the owner or occupant of such lands as may be flowed by the erection of such mill dam, any sum of money instead of the yearly damages he may be entitled to receive from the owner or occupant of such mill dam, by virtue of this act, within one month after the past year's damages shall have become due. And if the\* owner or occupant of such lands shall not accept the same, but shall present a new complaint (*h*) to obtain an increase of

Owner may make a tender of yearly damages, &c., effect thereof.

[Mass. Stat. Mar. 4, 1800, § 1.]

[\*176]

binding on the grantees of the parties to the record. *Com. vs. Ellis*, 11 Mass. 466.

2. A verdict according to the provisions of § 6, is conclusive between the parties, except as to the future yearly damages. *Johnson vs. Kittridge et al.* 17 Mass. 79.

3. A verdict and judgment in a process under the statute for an assessment of damages, finding that the complainant has sustained no damages, is no bar to another's complaint for subsequent damages. *Stowell vs. Flagg*, 11 Mass. 364.

4. Nor is a recovery in an action at common law for damages by the erection of a mill, a bar to a remedy pursuant to the statute for subsequent damages. *Staple vs. Spring & al.* 10 Mass. 72.

(*h*) A complaint for increase of damages must set forth such former com-

CH. 45. said damages, he shall not be entitled to costs thereon unless he shall obtain an increase of the sum so tendered.

Owner of lands flowed may also offer to receive less than yearly damages established;

[Ib. § 2.]

effect of such offer.

Limitation of complaint for increase or decrease of damages.

[Ib. § 3.]

[Mass. Stat. Feb. 27, 1796, § 5.]

[\*177]

After notice the majority may proceed to rebuild or repair.

[Ib. § 6.]

[See ch. 437, Vol. 3, p. 280.]

and shall be reimbursed out of mill profits;

SECT. 10. *Be it further enacted*, That the owner or occupant of lands so flowed, may also offer the owner or occupant of such mill dam, to receive of him any proportion of the sum established as his yearly damages, by reason of the said flowing, within one month after the past year's damages shall have become due. And if the owner or occupant of such mill dam shall not agree to the same, but shall present a complaint to obtain a decrease of said damages, he shall not be entitled to costs thereon, unless he shall obtain a sum to be by him paid, as damages, less than the sum which the owner or occupant of such lands offered to receive of him.

SECT. 11. *Be it further enacted*, That no complaint shall be presented for an increase or decrease of said yearly damages, until the expiration of one month after the same shall have become due.

SECT. 12. [Repealed, by ch. 437, § 2, Vol. 3, p. 290.]

It provided for the calling of meetings of mill-proprietors, in case of repairs being necessary; and prescribed the form of notice, and mode of proving notice\*.]

SECT. 13. *Be it further enacted*, That if any proprietor so notified shall neglect to attend the said meeting; or being met shall neglect or refuse to agree with the major part in interest, of the proprietors of such mill, for repairing or rebuilding the same, in whole or part, so as to make the same serviceable, to pay his part of the charges of doing the same; the rest of the proprietors, being the major part in interest, may cause the same to be done; and shall be reimbursed and paid such sum or sums as they, or any of them, shall advance thereon beyond their respective proportions, with interest for the same in the mean time, out of the said mill or the profits thereof (i); and if said sums so advanced

plaint, with the proceedings thereon. *Vandersen vs. Comstock*, 9 Mass. 203.

(i) 1. The profits in such case furnish the only remedy against the part owner, who refuses to repair; and this remedy does not lie against his heirs, or assignees. *Carver vs. Miller*, 4 Mass. 559. It is otherwise by § 13, above.

2. Where a tenant for life of a part of a mill agrees that his cotenant

shall not be reimbursed or paid by the profits of said mill, or by the proprietors neglecting and refusing as aforesaid, within six months after the said repairs and buildings shall be completed, it shall be lawful for the proprietors so advancing said sums, to charge, in addition to the same, one per centum a month on the amount so advanced, from and after said six months, till the same shall be reimbursed or paid as aforesaid ; and their lien on such mill for the purpose of being reimbursed such repairs, shall continue notwithstanding the proprietor so neglecting or refusing, may decease, or may alien their interest in such mill : *Provided*, That nothing in this act contained shall be construed to make void any particular contract, made or to be made, for the repairing or rebuilding any mill or mills.

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if not so reimbursed or paid—what proceedings shall be had.

Proviso—this act not to affect special contracts as to such mills.

SECT. 14. *Be it further enacted*, That where any part or parts of such mill, shall at the time of such notice and meeting, be held and possessed by any minors, feme covert, tenant for years, in dower, by courtesy, for life, in tail, mortgager or mortgagee ; then the guardians of such minors legally appointed, husband of such feme covert in her right, such tenant, mortgager or mortgagee in possession, shall be deemed, for all the purposes of this act in so repairing or rebuilding such mill, the proprietor or proprietors thereof, and\* such guardians, husbands and persons having in possession such limited estates therein, shall be notified, vote and contribute accordingly ; and all advances so made by them respectively, for and on account of such minors, heirs of such married woman, those in remainder or reversion, or the other party in the mortgage, if not adjusted and paid by agreement, shall be recoverable in a special action on the case, with interest.

Guardians, husbands, and mortgagees, in certain cases to be considered as owners, within this act, and notified accordingly.

[Ib. § 7.]

[\*178]

SECT. 15. *Be it further enacted*, That every miller shall be provided with scales and weights to weigh corn, grain and meal to and from the mill, if required ; and if he shall neglect to keep such scales and weights, or refuse so to weigh corn, grain and meal, when required, he shall be fined for

Millers to be provided with scales and weights.

[Ib. § 8.]

shall repair, and reimburse himself, out of the profits of the mill, the profits are not answerable after the death of the tenant for life. *Ib.*

CH. 46. each neglect or refusal not exceeding five dollars, to be recovered, with costs by action of debt, by the party suing to his use, before any Justice of the Peace of the county where-in the offence shall be committed.

Amount of toll.

[Ib. § 9.]

SECT. 16. *Be it further enacted*, That the toll for grinding all sorts of grain shall not exceed one sixteenth part thereof. [Approved February 8, 1821.]

Additional Act, ch. 261, Vol. 3, p. 90.

## Chapter 46.

AN ACT directing the manner of Conveyance to be used by Counties, in purchasing and disposing of Lands.

Deeds made to the inhabitants of a county, their successors and assigns, to be good and valid.

[Mass. Stat. June 25, 1811, § 1.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That whenever any County in this State shall purchase any lands, whereon to erect a court-house, or jail, or for any other purposes authorized by law, the deed or deeds of the grantor or grantors duly executed, acknowledged, and registered, made to the inhabitants of the county, making the purchase, to have and to hold to the said inhabitants, their successors and assigns forever, shall be good and valid, to all intents and purposes, to vest in the said inhabitants and county their successors and assigns, in fee simple, all the right, title, interest and estate whatever which the grantor or grantors in such deed or deeds had, at the execution thereof, in the lands contained therein.

[\*179]

Deeds of different forms for the benefit of counties confirmed.

[Ib. § 2.]

SECT. 2\*. *Be it further enacted*, That all grants and conveyances heretofore made to the inhabitants of any county, or to their Treasurer, committee, or any other person or persons, and by whatever form of conveyance for the use and benefit of such county in any manner whatever, shall be deemed and holden to be the property of such county; and all such conveyances shall have the same force and effect as if

they had been made to the inhabitants of such counties by **CH. 47.**  
their respective corporate names.

**SECT. 3.** *Be it further enacted,* That the court which by law may have the powers in relation to county lands, may by their order of record, appoint an agent or agents, to sell and dispose of any real estate of said county, and the deed or deeds of such agent or agents under their proper hands and seals, for and in behalf of the inhabitants of such county, duly acknowledged and registered shall be sufficient to all intents and purposes to convey to the purchaser or purchasers, all the right, title, interest and estate whatever, which the county may then have to the premises so conveyed.

Certain courts may appoint agents to convey county lands, &c.

[Ib. § 3.]

Their deeds valid to pass the estate.

**SECT. 4.** *Be it further enacted,* That in all cases where any real estate may be holden in trust, for the use and benefit of any county by any conveyance whatever, and no convenient and effectual remedy may exist at common law, to enforce the execution of such trust, the Supreme Judicial Court shall have full powers and process, and they are hereby empowered to enforce the execution of such trust, according to the course of proceedings in equity. [Approved March 15, 1821.]

Sup. Judicial Court to exercise all equity powers over trusts.

[Ib. § 4.]

## Chapter 47.

AN ACT for the settlement of certain equitable claims arising in Real Actions.

**SECT. 1.** *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That (a) when any

(a) 1. This action has relation only to real actions brought for the recovery of lands; that is, to writs of right, and of entry; not to writs of partition at common law, or petition for partition. *Baylies & al. vs. Bussey*, 5 Glf. 158; *Liscomb & ux. vs. Root*, 8 Pick. 376.

2. This writ was never intended to apply to trials by review, in which the merits tried before can alone be tried. *Hart vs. Johnson*, 7 Mass. 473.

3. But the tenant may have the benefit of it, on an appeal, if he has not claimed it before. *Ib.*

4. The intention of the provisions of § 1, is, to provide for those settlers upon land, who had entered against the will or without the knowledge of the proprietor; and not for those who had entered under a lawful contract, by



**CH. 47.** action has been (b) or may hereafter be commenced against any person for the recovery of any lands or tenements, hold-  
 en by such person by virtue of a possession and improve-  
 ment, and which the tenant or person, under whom he claims,  
 has had in\* actual possession for the term of six years (c), or

Jury to ascer-  
 tain value of  
 improvements,  
 &c.

[\*180]

the performance of which they might be entitled to a conveyance. *Knox & al. vs. Hook*, 12 Mass. 331; *Runey & al. vs. Edmonds*, 15 Mass. 294.

5. But they cannot be so construed as to operate only in favor of those who knowingly and wilfully enter upon lands belonging to others. *Newhall vs. Saddler*, 17 Mass. 350.

6. Where, in a writ of entry, the tenant prayed for an appraisement of the land, under the provisions of this statute, and after verdict for the demandant he abandoned the land to the tenant at the price found by the jury, for which sum judgment was thereupon rendered for the demandant, and the tenant appealed therefrom to this Court, but failed to enter and prosecute his appeal; upon complaint of the demandant, the judgment of the Court, for the value of the land in money, was affirmed in this Court, with interest, and single costs. *Knox & al. vs. Lermond*, 8 Glf. 377.

(b) In extending this statute to actions *pending*, the intention of the legislature was, not to interfere with the vested rights of the parties, but merely to give a remedy for the right to betterments, which already existed in equity and good conscience, and which there had been no means before provided by law for enforcing. *Brackett vs. Norcross*, 1 Glf. 92.

(c) 1. This provision extends to all cases where the tenant, or those under whom he claims, have been in possession six years or more, before the suit, by any title whatever, if the demandant has a better title. *Bacon vs. Callendar*, 6 Mass. 303; *Runey & al. vs. Edmonds*, 15 Mass. 294.

2. The Legislature by this statute could never intend to interfere with cases in which the tenant in possession shall have made an agreement and compromise with the proprietor. *Shaw & al. vs. Bradstreet*, 13 Mass. 243.

3. Hence, where the tenant agreed to purchase the premises of the proprietor at a certain price, and afterwards conveyed his possession to another, the grantor and the grantee, the latter *having notice* of his grantor's agreement with the proprietor, were both holden bound by the agreement, and therefore not entitled to any relief under the provisions of this statute. *Ib.*

4. Where the possessor of a parcel of land entered into a written contract with the proprietor, for the purchase of the land at a stipulated price, which he never paid; and afterwards conveyed all his right in the land to a third person, without notice of the contract with the proprietor; it was holden that the grantee, after six years, in an action by the proprietor, was entitled to the increased value of the premises by reason of the improvements made by *himself*, under the provisions of this statute; but not to the benefit of the improvements made by his grantor. *Prop. Ken. P. vs. Kavanagh*, 1 Glf. 348.

5. *Russell vs. Blake*, 2 Pick. 507; *Poignard vs. Smith*, 6 Pick. 173.

more, before the commencement of such action, the Jury, which try the same, if they find a verdict for the demandant, shall, (if the tenant so request) also inquire, and by their verdict ascertain the increased value of the premises, by virtue of the buildings and improvements made by such tenant, or those under whom he may claim ; and (if the demandant require it) what would have been the value of the demanded premises, had no buildings or improvements been made by such tenant, or those under whom he may claim ; and if during the term in which such verdict shall have been given, the demandant shall make his election on record, in open Court, to abandon the demanded premises to the tenant, at the price estimated by the Jury as aforesaid, then no judgment for possession shall be rendered on the verdict, but judgment for the sum so estimated (*d*) ; and after one year, a writ of execution may issue for the same sum with one year's interest thereon and costs of suit, unless the tenant shall, within one year after the rendition of said judgment, pay into the Clerk's office of said Court, for the use of the demandant, one year's interest of the said sum, together with one third part of the said sum, and the costs of suit, if taxed, in which case the said

CH. 47.

[Mass. Stat.  
Mar. 2, 1908,  
§ 3; and Mar.  
2, 1810.]

Demandant  
may abandon;  
judgment and  
execution in  
such case.

[Respecting  
costs, see ch.  
397, Vol. 3,  
p. 246.]

(*d*) 1. If the entry of judgment on the verdict, in such case, be delayed at the request of the tenant, interest will be added to the price estimated by the jury from the time of finding the verdict. *Winthrop vs. Curtis*, 4 Glf. 297.

2. After the demandant has abandoned to the tenant the land demanded, at the value estimated by the jury, the tenant can no longer be considered as holding it by virtue of a possession and improvement. *Prop. K. Purchase vs. Davis*, 1 Glf. 309.

3. Such abandonment has the effect of a conveyance of the estate to the tenant, on condition of his paying the estimated value within the periods provided by law. *Ib.*

4. And if the tenant do not pay the value within the periods limited, he is considered as yielding to the demandant all his title and claim, both to the soil and his improvements thereon; and he cannot have them again estimated in a *scire facias* brought to revive the original judgment. *Ib.*

5. See *Knox & al. vs. Lermond*, 3 Glf. 277, or above, note *a*, 6.

6. It probably was not the intention of the legislature to leave the tenant exposed to an action for the meane profits, after the terms have been adjusted by the jury, on which he should be entitled to hold, or should be obliged to abandon the land. *Jones vs. Carter*, 12 Mass. 315; *Codman & al. vs. Jenkins*, 14 Mass. 100.

- CH. 47.** writ of execution shall further stay ; and if the tenant shall within two years after the rendition of said judgment further pay into the Clerk's office as aforesaid, one year's interest of two third parts of the said sum, together with one other third part of the said sum, then the said writ of execution shall further stay : otherwise may issue for two third parts of the said sum, and one year's interest thereon ; and if the tenant shall within three years after the rendition of said judgment, pay into the Clerk's office as aforesaid, the remaining third part of the said sum, and one year's interest thereon, having made the several payments aforesaid, the writ of execution shall be perpetually stayed, otherwise it may issue for the said one third part of the said sum and one year's interest thereon ;
- Lien on the demanded premises.** and the said demanded premises shall be held for the security of the sum so estimated, and interest thereon, and costs of suit, until sixty days after a writ of execution might have issued as aforesaid, liable to be taken in execution, in like
- [\*181]** manner\* as real estate or equities of redemption attached on mesne process, notwithstanding any intermediate conveyance, attachment or seizure upon execution, and the demandant may cause his writ of execution, when issued as
- May be extended on,** aforesaid, to be extended on the said premises, in like manner and with like effect in all respects, as executions may by law be extended on real estate ; or he may cause the same premises, or so much thereof as will satisfy said execution and costs, to be taken and sold upon the said execution in like manner and with like effect in all respects as equities of redemption may by law be taken and sold on execution ;
- or sold.** and the tenant and his heirs shall have a good title to the demanded premises, against the demandant and his heirs forever, except the liability aforesaid. But should the tenant or his heirs afterwards be evicted therefrom, by a higher or better title of any claimant or claimants, if he shall have duly notified the original demandant, or his heirs, to aid him in the defence of such suit, and admitted him to aid accordingly, in case of his appearing and offering to aid, such tenant or his legal representative shall be entitled to receive and recover back the same money, with the lawful interest thereof from him, her or them, who shall have had the use
- If the tenant is afterwards evicted he may recover back the money paid.**

and benefit thereof in an action for money had and received to the use of such tenant or his legal representative ; and if the demandant shall not so make his election on record as aforesaid, no writ of seizin or possession shall issue on a judgment founded on such verdict, unless the demandant shall, within one year from the rendition thereof, have paid into the Clerk's office of the same Court, or to such other person as the Court may for that purpose appoint, for the use of the tenant, or the person or persons justly entitled thereto, such sum with the interest thereof, as the Jury shall have assessed for buildings or improvements as aforesaid ; and a new action for the recovery of the same premises shall not be sustained in any Court, unless the demandant shall first have paid to the tenant, all such costs as would have been taxed for him had he prevailed in the first suit : *Provided nevertheless*, That nothing herein contained, shall extend to any action which is or may be commenced by any mortgagee, his heirs or assigns, against any mortgagor, his heirs or assigns.

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If the demandant does not abandon, writ of seizin to be stayed one year.

Proviso.

SECT. 2\*. *Be it further enacted*, That no tenant against whom judgment shall be rendered in any case, where the value of the buildings and improvements shall have been ascertained as aforesaid, shall unnecessarily cut any wood, or take any timber from off the premises recovered against him, her or them, or make any strip or waste thereof ; and such tenant shall be liable to answer therefor in the same way and manner he would have been, had judgment for possession been rendered on the verdict, and possession actually been delivered in execution of such judgment.

[\*182]


Tenant not to cut wood in certain cases.

[Mass. Stat. Mar. 2, 1806, § 4.]

SECT. 3. *Be it further enacted*, That if the tenant, or person under whom he claims, shall have had in actual possession for the term of six years, or more, before the commencement of such action, any land or tenements more than shall be demanded, and by the tenant be defended in said action, lying in the same tract or parcel therewith, to recover which the demandant had, at the time of the commencement of his action, as high and as good a title as he had to recover the demanded premises, such tenant may request that the Jury may by their verdict ascertain the same, and

If the tenant has in possession more than is demanded, provision in such case.

[See ch. 344, § 1, Vol. 3, p. 196.]

CH. 47.  if the Jury shall find, that the demandant had as high and as good a title to recover such lands or tenements not demanded or any part thereof, as he had to recover the demanded premises, they shall not proceed to ascertain any other point by their verdict, and the Court shall thereupon render judgment that the demandant take nothing by his writ, and that the defendant recover his costs : *Provided*, That if such request be made in any such action now pending or which may hereafter be pending, the Court may permit the demandant without costs so to amend his declaration as to include all the lands or tenements possessed and defended by the tenant in manner aforesaid, of which the demandant had as high and as good a title as he had of the premises originally demanded in the action.

Proviso.

If the writ is amended, provision in such case.

[\*183]

[See ch. 344, § 4, Vol. 3, p. 191.]

SECT. 4. *Be it further enacted*, That (e) in any such action, the tenant or his attorney may in any stage of the process, and as often as the writ shall be amended as aforesaid, offer and give notice in open Court at what sum he consents, that the increased value of the premises, by virtue of the buildings and improvements shall be assessed, and also at what sum\* he consents that the value of the demanded premises, or such part thereof, as is by him defended, shall be estimated without the buildings and improvements, which notice shall be entered on the record of the Court ; and if the demandant consent to the same, judgment shall be rendered on said consent of the parties in the same manner, as if the like sums had been found by the Jury in a verdict for the demandant ; but if the demandant shall not consent to the said offer and shall proceed in the suit, and the Jury by their verdict shall not reduce the value of the buildings and im-

(e) 1. An offer made by a tenant, under the provisions of § 4, cannot afterwards be withdrawn by him, it being in its nature an admission on his part, of the value of the estate. *Proprietors of K. Purchase vs. Davis*, 2 Glf. 352.

2. Where such an offer was made in the C. C. Pleas, and the demandant proceeded to trial, and the jury having estimated the land lower, and the improvements at a higher sum than the tenant offered, the demandant appealed to the S. Court ;—it was holden that the proceedings in the C. C. Pleas being nullified by the appeal, the demandant's right to accept the offer still continued, and might be exercised in this Court. *Ib.*

provements below the said offer, nor increase the value of the demanded premises as aforesaid above it, he shall not recover costs from and after the first entering of such notice upon the record, but the tenant shall from that time recover his costs, and have his separate judgment and execution for the same, although the verdict on the issue should be against him ; unless the demandant shall prevail on a plea of disclaimer in the same suit. CH. 47.

SECT. 5. *Be it further enacted*, That to constitute the possession and improvement intended by this act, it shall not be deemed necessary that the premises defended shall have been surrounded by fences or rendered inaccessible by other obstructions ; but it shall be sufficient if the possession, occupancy and improvement thereof by the tenant, or those under whom he claims, shall have been open, notorious and exclusive, comporting with the ordinary management of similar estates in the possession and occupancy of those who have title thereto, and satisfactorily indicative of such exercise of ownership as is usual in the improvement of a farm by its owner, and no part of the premises demanded and defended in manner aforesaid shall be excluded from the appraisement herein provided because the same may be woodland or without actual cultivation. What shall constitute a possession and improvement.

SECT. 6. *Be it further enacted*, That no person shall be allowed to sit upon a Jury for the trial of any such action, where the value of the buildings and improvements are to be ascertained or the value of the premises to be estimated by the verdict, where such person shall be interested in a similar question, either as proprietor or occupant ; but the same shall be good cause of challenge to such juror (f). Who shall not sit on the jury.  
[Mass. Stat. Mar. 2, 1808, § 5.]

SECT. 7\*. *Be it further enacted*, That the third, fourth [\*184]

(f) It is good cause of challenge to a juror in the trial of a real action, in which the jury are to inquire into the value of the land, had no buildings or improvements been made by the tenant, and the increased value of the same by reason of such improvements, that such juror is interested in a similar question : but if the party neglects to take the exception before the trial, and to put the juror on the *voir dire*, the exception comes too late after the trial ; unless it appears that the party made the requisite inquiry, and failed of discovering the fact before the trial. *Jeffries & al. vs. Randall*, 14 Mass. 205. See, *Inhbt. of Amherst vs. Inhbt. of Hadley*, 1 Pick. 38.

**CH. 48.** and fifth sections of an act of the Legislature of Massachusetts passed on the second day of March one thousand eight hundred and eight, entitled, "An Act for the limitation of certain real actions and for the equitable settlement of certain claims arising in real actions," and the acts in addition to the said act, be, and the same are hereby repealed, and of no further effect in this State. [Approved June 27, 1820.]

Parts of Act,  
Mar. 1808, re-  
pealed.

Additional Act, ch. 344, Vol. 3, p. 190.

## Chapter 48.

AN ACT directing the manner in which Inquests of Office shall be taken to revest Real Estate in the State or to entitle the State thereto.

**SECT. 1.** *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That in all cases where lands, tenements or hereditaments have heretofore been granted, or confirmed by the late Province or Colony of Massachusetts Bay, Commonwealth of Massachusetts, or by this State, or which may hereafter be granted or confirmed by this State, on certain conditions in such grants or confirmations mentioned, and the State shall claim to be revested in the same, for the breach of one or more of the said conditions, an inquest of office shall thereupon be taken in the Supreme Judicial Court in the County where the estate lies, in the manner following, that is to say, the Attorney General shall, upon the direction of the Legislature, file an information in behalf of the State, in the said Court, at any term thereof, in any county, setting forth among other things, the grant or confirmation, with the conditions therein mentioned, and assigning the breaches of such of the said conditions, as shall be directed by the Legislature; or such breach or breaches of conditions as to him shall appear proper; though there shall be no act of the Legislature designating the same; and alleging that by force thereof the State have right by law to be revested in the said estate, and praying that process may issue thereupon in due course of law; whereupon the

In what cases  
inquests of of-  
fice may be ta-  
ken in the S.  
J. Court.

[Mass Stat.  
June 18, 1791,  
§ 1.]

Attorney Gen-  
eral to file in-  
formation,

stating the  
grant, condi-  
tions, and  
breaches.

Court shall order a scire facias to issue against such person or persons, bodies politic and corporate, or, proprietors as the Attorney\* General in his information, shall allege, to hold the estate under such grant or confirmation, returnable to the said Court at one of the terms, to be holden in the county where the estate lies ; which scire facias shall be served thirty days before the sitting of the Court to which the same is made returnable. And if the defendant shall not appear, or appearing shall refuse to plead, judgment shall be rendered, that the State be reseized of the estate described in the information ; and if the defendants shall, by plea disclaim to hold the said estate, or any part thereof, then judgment shall be rendered that the Attorney General take nothing by his information so far as the same respects the estate so disclaimed, and the defendants, their heirs and assigns shall forever thereafter be estopped from claiming or holding the estate so disclaimed under the said grant or confirmation. But if the defendants shall claim to hold the said estate or any part thereof under such grant or confirmation, and shall traverse the breaches assigned, issue being joined thereon, the same shall be tried by Jury at the bar of the said Court, in the usual and due course of law ; and a view may be granted or a plan ordered, when necessary, as in the trial of real actions. And if the issue be found in favour of the State, judgment shall be rendered, that the State be reseized of the said estate, and recover costs of suit ; for which costs, execution shall issue in due form of law : but if the issue shall be found for the defendants, judgment shall be rendered that they recover their costs of suit, to be taxed by the Court, and paid out of the public treasury, by warrant of the Governor and Council : *Provided nevertheless*, If the only condition alleged to be broken is, that the defendants hold more land under such grant or confirmation than they have right, by force thereof to hold, and the same shall appear, either by verdict of the Jury, or confession of the defendants ; then the Justices of the said Court shall have power to assign to the defendants by metes and bounds, at **their** request and cost, so much of the land which shall be held by the defendants as aforesaid, as shall be equal in

## CH. 49.

[\*185]  
Court to issue scire facias to persons informed against.  
Scire facias to be served thirty days before Court.  
If no appearance, or total or partial disclaimer be pleaded—judgment, how to be entered, for *whole* or *part* as case may be.  
Effect of disclaimer.

If defence be made, what proceedings are to be had.

If issue be in favour of State judgment for reseizin and costs.

If defendant prevail—entitled to costs from treasury.

If condition broken be that defendant holds more land than he is entitled to,

Court may assign true quantity.



CH. 48. quantity to the land they might lawfully have held under such grant or confirmation, and in such part thereof, as shall be just and reasonable, under all the circumstances of the case,\*

to be located by persons appointed by the Court,

and return made to the Court thereof.

If confirmed by them judgment to be entered.

and may order the same to be located by proper persons to be appointed for that purpose by the Court, at the expense of the defendants ; which location with a plan thereof, shall be returned to the said Court, and may be confirmed by the same, unless good cause be shown to the contrary by the Attorney General or the defendants. And if such location shall be confirmed, then the Court shall order an attested copy thereof, and of the said plan, to be filed at the expense of the defendants in the Secretary's office, and judgment shall be rendered that the State be reseized of the residue and recover costs of suit.

Inquest in all other cases to be taken in the county where the lands lie, by S. J. Court.

[Ib. § 2.]

Substance of the information to be filed by Attorney General.

Notice and mode of it.

No person appearing, judgment for State.

If a defence—to be tried by jury.

SECT. 2. *Be it further enacted*, That in all other cases where an inquest of office is necessary by law to entitle the State to hold lands, tenements or hereditaments, such inquest shall be taken by the Supreme Judicial Court in the county (a) in which such estate lies, upon information of the Attorney General, describing among other things the estate claimed, and the title set up thereto by the State ; and upon the filing of such information, the same proceedings shall be had as before directed, *mutatis mutandis*, unless where there is no tertenant, and in such case, notice shall be given to any person or persons claiming such estate, to show cause at such term of the said Court, as shall be mentioned in the notification, why judgment should not be rendered, that the State be seized of such estate, by causing an attested copy of such information with the order of Court thereon to be published in such public newspapers as the Court shall direct, three weeks successively, ninety days at least before the sitting of the said Court : and if no person shall appear, and by plea deny the title of the State to such estate, then judgment shall be rendered that the State be seized thereof : But if any person shall appear and by plea, deny the title set up by the State, the cause shall be tried by a jury at the bar of

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(a) The information may be filed in a different county from that where the land lies, and the summons be made returnable in the latter county. *Cutts vs. Commonwealth*, 2 Mass. 284.

the Court ; and a view or a plan may be ordered, as in the trial of real actions ; and if a verdict shall be found that the State have good title to such estate, judgment shall be rendered, that the State be seized thereof and recover costs of suit against the defendant : for which costs execution shall issue in due form of law : but if the jury shall find, that the State hath no title to such estate, and that the defendant hath good title\* thereto, the defendant shall recover his costs of suit to be taxed by the Court, and paid out of the public treasury by warrant of the Governor and Council ; but if the jury do not find that the defendant hath good title to such estate, then he shall not be allowed his costs.

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View may be had.  
Proceedings & judgment.

If defendant recover judgment, costs to be paid from State Treasury.

[\*187]

SECT. 3. *Be it further enacted*, That when it shall be found by the Attorney General, for the time being, that there are any lands, tenements or hereditaments, which for want of legal heirs, have accrued to the State, that it shall be the duty of the Attorney General to prosecute a suit by inquest of office in the Supreme Judicial Court in the county wherein such estate is situated, in order to cause the State to become seized thereof ; and that on such process and trial, the person, against whom such process and suit shall be so brought, shall not be allowed to give in evidence, or to avail himself of the title or right of any alien, or subject of another nation or sovereign, unless he can shew that he is tenant to, agent, servant or bailiff of such alien.

Attorney General to prosecute suit by inquest for lands, &c. that have accrued to State for want of heirs.

[Mass. Stat. Feb. 6, 1799.]

No defendant to avail himself of alien's title, unless he be his tenant, agent, &c.

SECT. 4. *Be it further enacted*, That if it shall appear to the Court that the person against whom such estate shall be demanded, had, at the time of the service of the process upon him, a good and valid title in himself to the premises demanded, or that he then was in the possession of the same as the tenant, agent, servant or bailiff of any alien who had a right thereto or to any part thereof, then the Court shall award the defendant his full cost, which shall be paid out of the public treasury, according to the Constitution of the State : but if such party had not a title in himself when the process was served upon him, nor was the tenant, agent, servant or bailiff of such alien at that time, but shall have afterwards acquired a title, been made a tenant, or become the agent, servant or bailiff of any alien in whom such estate is, then

If on trial the defendant prove himself owner or tenant, agent, &c. of an alien owner, he shall be entitled to his costs, &c.

[Ib. § 3.]

Proceedings in case of title acquired or privilege existing after service of process on defendant.

CH. 48. judgment shall be awarded against him for the full costs : and the Attorney General shall cease to prosecute further on the process.

State to be deemed in possession on judgment of re seizure.

[Mass. Stat. Jan. 18, 1791, § 3.]

[\*188]

Judgment to conclude all parties.

SECT. 5. *Be it further enacted*, That (b) when any judgment shall be rendered on any inquest of office, that the State be re seized, or seized of any lands, tenements or hereditaments, the State shall immediately upon the rendition of such judgment, be deemed and taken in the law, to be in fact seized\* of all such estate, to all intents and purposes whatever ; and all judgments rendered on any inquest of office, taken by virtue of this act, shall conclude all parties and privies (c) thereto, their heirs and assigns so long as such judgment shall remain in full force.

If after State become seized for want of heirs, owner appear and recover the estate by legal process,

[Mass. Stat. Feb. 6, 1799, § 2.]

liable for improvements,

the amount of which shall be ascertained on bill in equity in S. J. Court, to be filed by Attorney General or tenant, &c.

SECT. 6. *Be it further enacted*, That if after the State shall become so seized of such estate, as having accrued thereto for want of legal heirs, any person shall appear, and make out his right to the same, and shall in due process of law recover the same against the State, its grantee, assignee, or tenant, that the same estate shall nevertheless be liable to all expenses of improvement thereon made, over and above the rents and profits thereof ; and the Attorney General, or the tenant, grantee or assignee of the State, shall be empowered to file a bill in equity in the Supreme Judicial Court of the county where the land is, for the recovery of the same ; and a summons shall be issued, with a copy of such bill thereunto annexed, and served on the owner of such land or on his tenant, fourteen days before the sitting of the Court to which it may be returnable ; and that the Supreme Judicial Court shall proceed to try the same, by a Jury or otherwise, according to the principles of the laws and Constitution of the State, and shall issue an execution against such

(b) On the rendition of judgment, the Commonwealth under the provisions of § 5, is in immediate possession, without entry or execution. *McNeil vs. Bright & al.* 4 Mass. 290.

(c) By privies thereto must be understood those who are privies to the judgment by reason of their privity in any estate or title, claimed under a grant or confirmation by the commonwealth, or in any other estate liable to be impeached by an inquest of office. *Cushing & al. vs. Hackett*, 10 Mass. 168 ; *Gerrish vs. Bearce & al.* 11 Mass. 193.

estate for the payment of such sum as shall be adjudged on such process ; and the Sheriff or other officer to whom the same shall be directed, shall at public auction sell so much of the same lands as shall be sufficient to pay the same, with all charges, unless the same shall be otherwise discharged. [Approved February 24, 1821.]

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### Chapter 49.

AN ACT directing the manner of giving notice in certain cases.

**BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That in every case, where any notice respecting real estate is now required by law to be given by advertisement, in one of the Boston newspapers,\* or in the newspaper of the printer of the General Court, for the time being, such notice instead of being given in said Boston newspaper, or in the newspaper of the printer of the General Court, for the time being, shall hereafter, be given by advertising in one of the newspapers printed in Portland, and in one of the newspapers printed in the county where such real estate lies, or the next adjoining county, if any such newspaper there be. [Approved June 17, 1820.]

Notice to be given in a Portland newspaper in certain cases.

[\*189]

### Chapter 50.

AN ACT for giving Remedies in Equity.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That the Justices of the Supreme Judicial Court shall have power and authority to hear and determine in equity (a) all cases of trust arising

Equity powers given to Sup. Jud. Court as to trusts under deeds, wills, &c.

(a) 1. A statute granting chancery powers to relieve against all penalties and forfeitures, in actions at common law, it *seems*, may be allowed, if such is its general language, to operate upon penalties and forfeitures already incur-

**CH. 50.** under deeds, wills or in the settlement of estates (b); and all cases of contract in writing, where a party claims the specific performance of the same, and in which there may not be a plain, adequate, and complete remedy at law (c). And the bill or complaint in such cases may be inserted in a writ of attachment or original summons, returnable to the same Court; and such writ be served on the adverse party as other writs of attachment, or original summons are by law to be served. And the said Justices of the Supreme Judicial Court shall have authority to issue all such writs and processes as may be necessary or proper to carry into effect the powers hereby granted: and to make from time to time all necessary rules (d) and orders for the convenient and orderly conducting of the said business: *Provided*, the same be not repugnant to the constitution and laws of this State; and provided also that the cases of contract, to which this act shall apply, shall be such only as shall be hereafter made in writing, or which have

[Mass. Stat.  
Feb 10, 1818,  
§ 1.]

What kind of  
process to be  
used.

S. J. Court  
may use pro-  
cess to execute  
the powers  
granted,  
and make  
rules, not re-  
pugnant to  
Constitution  
and laws.

Limitation as  
to contracts  
within this  
act.

red at the time of its enactment, without violating the principle that vested rights are not to be disturbed. *Potter vs. Sturdivant*, 4 Glf. 154.

2. In equity, relief will be given against mere lapse of time where that is not of the essence of the contract; if the party seeking relief has acted fairly; unless the delay of performance on his part has been so long as to justify the inference that he had abandoned the contract. *Getchell vs. Jewett*, 4 Glf. 350.

3. The want of mutuality in a contract is no objection in equity, if it has been signed by the party sought to be charged. *Ib.*

4. The equity jurisdiction given to the S. Court was not intended to impair or relax the rules of evidence which govern contracts under seal, or written contracts. *Dwight vs. Pomeroy & als.* 17 Mass. 325.

(b) This provision is applicable only to express trusts, arising from the written contracts of the deceased; and not to those implied by law, or growing out of the official character or situation of the executor or administrator. *Given & ux. vs. Simpson & al.* 5 Glf. 303.

(c) 1. It is not necessary, to found a decree for specific performance of a contract, that the breach be such as would support a claim for damages at law. *Getchell vs. Jewett*, 4 Glf. 350.

2. The party sought to be charged may shew by parol, that by reason of fraud, surprise, or mistake, the contract does not truly exhibit what was agreed on between the parties. *Bradbury vs. White*, 4 Glf. 391.

(d) For rules, see 6 Glf. 481.

so been made since the tenth day of February in the year CH. 50.  
eighteen hundred and eighteen.

SECT. 2. *Be it further enacted (e)*, That in all causes brought before the Supreme Judicial Court of this State or before any\* Circuit Court of Common Pleas to recover the forfeiture annexed to any articles of agreement, covenant, contract, or charter party, bond, obligation or other specialty or for forfeiture of real estate upon condition, by deed of mortgage, or bargain and sale with defeasance (*f*), when the forfeiture, breach or non-performance shall be found by Jury, by the default or the confession of the defendant, or upon demurrer, the Court before which the action is, shall make up judgment therein for the plaintiff to recover so much as is due according to equity and good conscience (*g*).

[\*190]  
Courts may exercise chancery powers as to forfeitures, &c. and enter judgment for what is equitably due.

[Mass. Stat. Nov. 4, 1785, § 1.]

[See ch. 463, Vol. 3, p. 304.]

SECT. 3. *Be it further enacted (h)*, That when any action shall be brought and prosecuted on any bond or other specialty, with penalties, for the payment of sums of money, performance of covenants, contracts, agreements, matters or things to be done at several times, and the plaintiff recover the forfeiture of such penalty; the Court shall enter up judgment for the whole of such forfeiture, and award execution only for so much of the debt or damage as is due (*i*) or

In case of penalties forfeited, Courts to enter judgment for the whole penalty and issue execution for sum due.

[Mass. Stat. Mar. 1, 1789, § 6.]

(*e*) § 2 relates only to specialties under the hand and seal of the party contracting; and not to recognisances. *Paul vs. Nowell*, 6 Glf. 239.

(*f*) 1. All estates upon condition do not fall within the range of the remedies in equity given by the statute; but such only as arise from deeds of mortgage, or of bargain and sale with defeasance. *Frost vs. Butler*, 7 Glf. 230.

2. The defeasance must be of as high nature as the conveyance; must be executed at the same time, and is to be considered as a part of it. *Kelleran vs. Brown*, 4 Mass. 445.

(*g*) When the statute authorises the court to proceed *according to equity and good conscience*, it was undoubtedly intended that they should proceed, as to the subject matter of their jurisdiction, in the same manner as courts of a similar jurisdiction proceed in England, to whose laws and forms of trials all our statute provisions are referable, when no particular provision for the mode of trial is enacted. *Pomeroy vs. Winship*, 12 Mass. 525.

(*h*) See note *e* to § 2; also ch. 497, Vol. 3, p. 343.

(*i*) In a hearing in chancery upon a penal bond, it is the *plaintiff's* duty to show how much is due in equity and good conscience. *Gowen vs. Nowell*, 2 Glf. 13.

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[See ch. 463,  
Vol. 3, p. 304.]

Further damages in part of penalty, to be recovered on scire facias—

Proceedings in such cases.

In scire facias State vs. persons as principals

sustained at that time (*j*), so always that the said judgment shall stand and be a security to the plaintiff, his executors and administrators for any further and after payment or damages he or they may have just right to, by the non-performance or breach of the covenants, contracts, agreements or things in such bonds or other specialties contained; and who may have a writ or writs of scire facias (*k*) on said judgment from such Court, where the same was obtained, against the defendant, his heirs, executors or administrators, suggesting other and further damages sustained by non-performance or breach of such covenants, contracts and agreements, and to summon him or them to show cause why execution should not be awarded upon said judgment for other and further damages, as set forth in the writ and made out to the Court; upon which the Court shall proceed as aforesaid, as often as such damage shall accrue, and be sued for as aforesaid; or may have his action of debt, or on the case, as the case may require for such payment or damages as aforesaid.

SECT. 4. *Be it further enacted* (*l*), That in all actions of scire facias brought in the name and on behalf of the State, either in the Supreme Judicial Court or any Circuit Court

(*j*) 1. In such case the court will enter up judgment for damages incurred up to the time of rendering judgment—and will not restrict the plaintiff to such damages only as were incurred at the time of commencing the action. *Waldo vs. Forbes & al.* 1 Mass. 10.

2. Conditional judgment in a mortgage shall be for the amount of principal and interest due, though it exceed the penalty of the bond. *Pitts vs. Tilden & al.* 2 Mass. 118.

3. Interest beyond the penalty of a bond may be recovered in the shape of damages, even against a surety. *Harris vs. Clap & al.* 1 Mass. 308; *Warren vs. Thurlow & als.* 15 Mass. 154.

(*k*) Scire facias may run against the body and property of the respondent, by ch. 463, Vol. 3, p. 304.

(*l*) 1. § 4 relates only to recognisances taken or entered into in criminal cases, or by witnesses conditioned to appear in behalf of the State. *Paul vs. Nowell*, 6 Glf. 239.

2. The provisions of § 4, were plainly intended for cases of unavoidable accident, or irresistible necessity, and for the relief of unfortunate persons, and not for cases where the principal may be produced. *Com. vs. Dana*, 14 Mass. 65.

of Common\* Pleas, to recover the penalty or forfeiture of any recognisance (*m*) taken or entered into in criminal prosecutions, either by principal or sureties, or by witnesses to appear at either of the aforesaid Courts, and give evidence on the part of the State, when the forfeiture, breach or non-performance of the condition of such recognisance shall be found by the default or confession of the party, or by verdict of a Jury, or upon demurrer, the Court before which such action may be brought, may render judgment therein for the State according to the circumstances of the case, and the situation of the party, and may remit either the whole, or any part of the penalty of such recognisance, upon such terms and conditions as to them shall seem reasonable and just; any law or usage to the contrary notwithstanding. [Approved February 20, 1821.]

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[\*191]  
pal, sureties or  
witnesses—  
Courts may re-  
mit all or part  
of the penalty.

[Mass. Stat.  
Feb. 26, 1811.]

Additional Act, ch. 462, Vol. 3, p. 303.

## Chapter 51.

AN ACT to regulate the jurisdiction and proceedings of the Courts of Probate.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That a Court of Probate (*a*) shall be held within the several counties of the

Courts of Probate established.

(*m*) 1. Debt, as well as *scire facias*, lies on a recognisance to the State. *Com. vs. Green*, 12 Mass. 1.

2. In a *scire facias* upon a recognisance taken by a Justice of the Peace in a criminal case, it must appear that the recognisance has been returned to the Court having jurisdiction of the matter. *State vs. Smith*, 2 Glf. 62.

3. A *scire facias* can only issue from a court in possession of the record upon which it issues. *Com. vs. Downey*, 9 Mass. 492.

(*a*) The county Courts of Probate were never established by any statute, until the act of March 12, 1784. Before the revolution, the judges of probate were considered as surrogates of the Governor and Council, who derived from the royal charter the authority to prove wills and to grant administrations. A provincial act was passed for erecting courts of probate in the several counties, but it was negatived by the king. A number of other acts were afterwards passed, which recognize the power of the courts of probate, and regulate ap-



**CH. 51.** State : and there shall be in the manner the Constitution directs, some able and learned person in each county in the State, appointed or to be appointed Judge, for taking the probate of wills, and granting administrations on the estates of persons deceased, being inhabitants of, or resident (*b*) in the same county at the time of their decease, or having died without the State, and leaving estate of any kind within the same ; for appointing guardians to minors and other persons ; for examining and allowing the accounts of executors, administrators, or guardians, and for such other matters and things as the Courts of Probate within the several counties aforesaid, shall by law, have cognizance and jurisdiction of. And the said Judges of Probate shall have full power and authority to make out such process or processes as may be needful for the discharge of the trust reposed in them ; and all Sheriffs, Deputy Sheriffs, Coroners and Constables, are required duly to serve and execute all legal warrants, or other process\* to them directed, by any Judge of Probate. And contempt of authority in any cause or hearing before any Judge of Probate, shall, and may be punished in like manner as such contempt of authority in any Circuit Court of Common Pleas, may or can by law be punished.

[Mass. Stat. Mar. 12, 1784, § 1; Feb. 24, 1818.]  
powers and jurisdiction of Judge.

[\*192]

When Judge is interested &c. administration, &c. to be in adjoining county.

[Ib. Feb. 24, 1818, § 5.]

[† In a sum exceeding \$100, see ch. 198, Vol. 3, p. 21; see also, 5 Pick. 483.]

**SECT. 2.** *Be it further enacted,* That whenever any Judge of Probate shall be interested† as heir or legatee, creditor or debtor, or within the degree of kindred which by the laws of this State, he might by any possibility be heir in the estate of any person deceased, within the county of such Judge, such estate shall be settled in the Probate Court of the most ancient next adjoining county ; and the will, if any, of such deceased person, may be there proved, or administration granted, as the case may require ; and all other proceedings had thereon, in such adjoining county, as if such de-

peals from them to the Governor and Council, which were approved. *Wales vs. Willard*, 2 Mass. 124.

(*b*) The authority to grant administration vests exclusively in the Judge of probate for the county where the deceased person dwelt at the time of his decease, and the doings of any other Judge of probate, on such estate are void. *Cutts & als vs. Huskins*, 9 Mass. 514 ; *Holyoke vs. Huskins & ux*, 5 Pick. 25. See *Harvard College vs. Gore*, 5 Pick. 370.

2. See ch. 198, Vol. 3, p. 21.

ceased person had belonged to, or died within the same. **CH. 51.**  
 And whenever due application shall be made in writing to the Judge of Probate of such adjoining county, for the probate of a will, or the granting of letters of administration, in virtue of this act, he shall, after giving due public notice thereof, proceed thereon and settle such estate as fully, and to all intents as he might any other estate within his proper jurisdiction: *Provided always*, That nothing herein contained shall take away the right of appeal to the Supreme Court of Probate, as allowed in other cases.

**SECT. 3.** *Be it further enacted*, That there shall be in manner as the Constitution directs, a suitable person in each county appointed, or to be appointed Register of wills, administrations, accounts, decrees, orders, determinations and other writings, which shall be made, granted or decreed upon by the Judges of Probate, in their respective counties; which Register shall be sworn to the faithful performance of the duties of his office, and have the care and custody of all files, papers and books, to the Probate Office belonging; and in case of the death, sickness or necessary absence of the Register, it shall and may be lawful for the Judge of Probate to nominate and appoint some meet person to officiate as a Register, to be sworn as aforesaid, until the standing Register shall be able to attend his duty, or until a new one shall be appointed by the Governor and Council.

Register's power and duty.

[Ib. § 2.]

Judge of Probate may appoint Register pro tempore.

**SECT. 4\*.** *Be it further enacted*, That no Judge of Probate shall be allowed or admitted to have a voice in judging and determining, nor be permitted to be of counsel, or to act as an attorney either in or out of Court, in any civil action, or other process† or matter whatsoever, which may depend on, or have relation in any way to any sentence or decree, made or passed by him in his office aforesaid. Nor shall he be of counsel or attorney in any civil action for or against any executor, administrator or guardian, as such within the county in which said Judge shall reside. And no Register of Probate shall be appointed an administrator or commissioner of insolvency, appraiser or divider of, or upon any estate, or in any manner be interested in the fees and emoluments arising therefrom; or be of counsel, or in any

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Judge not to be of counsel, &c.

[Ib. § 4.]

[† See Cottle's case, 5 Pick. 483.]

Register not to be administrator, appraiser, &c. nor counsel.

CH. 51. way, directly or indirectly, act as an attorney in any matters and things whatsoever, which are or may be pending in the Court of Probate, of which he is Register, or in any appeals therefrom.

Judges to have stated court days.

[Ib. § 3.]

SECT. 5. *Be it further enacted*, That the Judges of Probate, in the respective counties shall have certain fixed days for the making and publishing of their orders and decrees ; and such days shall be made known by public notifications thereof in the several counties ; and all orders and decrees of Judges of Probate shall be made in writing and duly recorded.

S. J. Court to be appellate Court of Probate.

[Ib. § 6.]

SECT. 6. *Be it further enacted*, That the Supreme Judicial Court shall be the Supreme Court of Probate, and shall have appellate jurisdiction (c) of all matters determinable by the Judges of Probate in their respective counties ; and all appeals from any order or decree of a Judge of Probate, shall be to the said Supreme Court of Probate accordingly.

Administration, to whom granted ;  
[Mass. Stat. Mar. 9, 1784, § 8.]  
inventory, &c. appraisers, how appointed.

[† For mode of swearing, see § 34, of this ch.]

[\*194]

SECT. 7. *Be it further enacted*, That after the decease of any person intestate, administration of such intestate's goods and estate shall be granted unto his widow (d) or next of kin upwards of twenty-one years of age, or to both, as the Judge of Probate shall think fit, within thirty days ; and an inventory shall be taken of all the real estate, goods (e) and chattels, rights and credits of the deceased, within three months, by three suitable persons, appointed by the Judge of Probate, who shall be sworn† to the faithful discharge of their trust\* : and when any part of such estate lies without the lim-

(c) The legal construction of a will is exclusively a subject of common law jurisdiction ; and is not cognisable by the S. J. Court, when sitting as the S. C. of Probate. *Small & als. vs. Small*, 4 *Glif*. 220.

(d) The widow, if a suitable person to administer, is exclusively entitled to administration, unless among the next of kin there is some fit person whom the judge may prefer, or who he may think ought to be joined with the widow in a joint administration. *McGooch vs. McGooch*, 4 *Mass* 348.

(e) 1. The goods of a deceased intestate, in the hands of his administrator, are liable to be seized by an officer, having an execution against the effects of the intestate ; although the administrator has inventoried them and charged himself with the amount of the inventory in the probate office ; provided he has not paid the debts of the intestate, to the amount of the inventory. *Weeks vs. Gibbs*, 9 *Mass*. 72.

2. Estate discovered after first inventory, may be returned by new appraisers and distributed. See *ch.* 470, § 3, *Vol.* 3, p. 314.

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its of the county, in which the Judge of Probate lives, who has jurisdiction of the settlement of such estate, he may appoint three suitable persons, within the county where such estate may be, to take an inventory thereof, who shall be sworn in manner as aforesaid. And after the expiration of thirty days from the death of any person intestate, in case the widow or next of kin shall refuse or neglect to take out letters of administration, being cited before the Judge of Probate for that purpose, if resident within the county, the said Judge of Probate may commit administration of such estate to some one or more of the principal creditors†; and in case of their refusal to such other person or persons as the said Judge shall think fit. And every administrator shall, before entering upon the execution of the trust, give bond (f) to the Judge of Probate, with good and sufficient sureties (g) resident within this State, upon condition among other things, to make and return upon oath (h), a true inventory (i) of the estate administered upon, into the Probate office, within three months, and to render an account of administration within one year from the time of taking administration; which bond shall be in form following :

[†See ch. 401, § 2, Vol. 3, p. 252.]

Administrators to give bond.

Return an inventory within three months.

Know all men by these presents, That we \_\_\_\_\_ within the State of Maine, are holden and stand firmly bound and obliged unto \_\_\_\_\_, Judge of Probate of wills, and for granting administration within the county of \_\_\_\_\_, in the full and just sum of \_\_\_\_\_ to be paid to the said \_\_\_\_\_ and his successors in said office; to the true payment whereof, we do bind ourselves and each of us, our, and each of our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals. Dated the \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_

Form of bond.

(f) See notes to § 72, of this chapter.

(g) Sureties in an administration bond are liable for the amount of any chattels, which have come to the administrator's hands, as well before as after the execution of the bond, and granting of administration. *Dawes vs. Edes & als.* 13 Mass. 177.

(h) "The Judge of Probate of any County is authorized, at any convenient time and place, other than in open Probate Court, to administer the oaths required by law of Executors, Administrators and Guardians, to the truth of inventories by them returned; and also the oaths required for perpetuating evidence of the time, place and manner, in which Executors and Administrators may have given notice of their respective appointments, and the undertaking of the trusts thereof." See Statute passed Feb. 26, 1833.

(i) See note p, to § 15, of this chapter.

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[\*195]

of our Lord one thousand eight hundred and      ,  
 The condition of this obligation is such, that if the above bounden      , admin-  
 istrater of all and singular the goods and estate of      , deceased, do make  
 or cause to be made, a true and perfect inventory of all and singular the real estate,  
 goods and chattels, rights and credits of said deceased, which have or shall come  
 to the hands, possession or knowledge of      , the said      , or into the  
 hands or\* possession of any other person or persons for      , and the same so  
 made, do exhibit or cause to be exhibited upon oath into the Registry of the Court  
 of Probate of the said county of      , at or before the      day of  
 next ensuing; and the same goods and chattels, rights and credits, and all other  
 the goods and chattels, rights and credits of the said deceased, at the time of  
 death, which at any time after shall come to the hands and possession of the said  
 , or into the hands and possession of any other person or persons for the  
 said      , do well and truly administer according to law; and further to  
 make or cause to be made, a just and true account of      said administration,  
 upon oath, on or before the      day of      which will be in the year of our  
 Lord, one thousand eight hundred and      , and all the rest, residue and re-  
 mainder of the said goods and chattels, rights and credits, which shall be found re-  
 maining upon the said administration account, (the same being first examined and  
 allowed by the Judge, for the time being, of Probate of Wills and for granting ad-  
 ministrations within the county of      , aforesaid,) shall deliver and pay unto  
 such person or persons respectively, as the said Judge by his decree or sentence,  
 pursuant to law, shall limit and appoint: and if it shall hereafter appear, that any  
 last will and testament was made by said deceased, and the executor or executors  
 therein named do exhibit the same into the Court of Probate of the said county of  
 , making request to have it allowed and approved accordingly; if the said  
 above bounden, being thereunto required, do render and deliver the said  
 letter of administration (approbation of such testament being first had and made)  
 into the said Court; then the before written obligation shall be void and of none  
 effect, or else shall abide and remain in full force and virtue.

Sealed and delivered }  
 in presence of us, }

Administra-  
 tion may be  
 granted on the  
 estate of per-  
 sons dying out  
 and leaving  
 estate within  
 the State.

[\*196]

[Mass. Stat.  
 Feb. 24, 1818,  
 § 16.†]

SECT. 8. *Be it further enacted*, That when any person  
 who has died or shall die intestate without the State, shall  
 leave estate of any description within the same to be admin-  
 istered, any person interested in such estate shall be entitled  
 to letters of administration thereon in like manner as if such  
 intestate\* had died within the State; and the Judge of Pro-  
 bate of any county, wherein such estate shall be found, shall  
 have power to grant such letters of administration according-  
 ly, which shall extend to all the estate of such intestate with-  
 in the State, and the same estate shall be settled in the county  
 where such letters of administration shall have been first grant-  
 ed; and after such letters shall have been granted and notice  
 thereof given by the administrator in like manner as in other

†See *Stevens Admr. vs. Gaylord*, 11 Mass. 263, decided previous to the  
 enactment of § 16. *Harrington vs. Brown*, 5 Pick. 519.

cases, any new letters of administration on the same estate shall be void. CH. 51.

SECT. 9. *Be it further enacted*, That in all cases where-  
in by law bonds are required to be given to any Judge of Pro-  
bate, or to be filed in the Probate office, it shall be the duty  
of the said Judge first to examine and approve of such bonds,  
and upon their being so approved, but not otherwise, the said  
Judge shall order the same to be filed or recorded in the Pro-  
bate office.

Judge to ex-  
amine and ap-  
prove all Pro-  
bate bonds.

[Ib. § 23.]

SECT. 10. *Be it further enacted*, That every adminis-  
trator shall be held to account with the Judge of Probate, for  
the personal (j) estate of the deceased, as the same shall be ap-  
praised, unless the said Judge shall think it will be more for the  
benefit of the parties interested, otherwise to dispose of the  
same, in which case the said Judge shall order the same or any  
part thereof, to be sold at public auction, or at private sale in  
such manner as he shall determine will best serve the interest  
of all parties interested ; and the administrator shall account (k)  
for such estate as the same shall have been sold : *Provided*  
*always*, That such sale shall be ordered within the term of three  
months from the return of the inventory, and not afterwards,  
unless the said Judge of Probate, shall for special reasons,  
think proper to allow a further term not exceeding six months.

Administra-  
tors to account  
for personal  
estate as ap-  
praised, unless  
sold by order  
of Judge.

[Ib. § 19.]

If sold, to be  
within three  
months from  
return of in-  
ventory.

SECT. 11. *Be it further enacted*, That whenever any  
executor or executors of the last will of any person deceased,  
knowing of their being so named and appointed, shall neg-  
lect to cause such will to be filed within thirty days next  
after the death of the testator in the Probate office of the  
county where he last dwelt, and proved and recorded within  
such time as the Judge of Probate shall limit and appoint ;  
or present the said will, and in writing declare his, her or  
their refusal, every executor so neglecting his or her trust  
and\* duty in that behalf, (without just excuse made and ac-  
cepted by the Judge of Probate for such delay) shall forfeit  
a sum not exceeding sixteen dollars a month (l), from and

Wills to be  
filed in Pro-  
bate office  
within thirty  
days after de-  
cease of testa-  
tor ;

[Mass. Stat.  
Feb. 6, 1784,  
§ 16.]

Forfeiture for  
executor's neg-  
lect,

[\*197]

(j) A lease of land for 999 years is personal estate. *Petition of Gay*,  
*Admr. 5 Mass.* 419.

(k) Executors are also holden to a like account ; see note, r, 8, § 15, of  
this chapter.

(l) 1. This penalty may be sued for at the end of every month, within a

## CH. 51.

and how re-  
covered.

Judge may  
grant adminis-  
tration in case  
of executor's  
refusal, &c.

Judge may  
grant dedimus  
to take deposi-  
tions of wit-  
nesses to wills  
in certain ca-  
ses.

[Mass. Stat.  
June 29, 1785,  
§ 3.]

after the time limited as aforesaid, until he, she or they shall cause said will to be filed and probate thereof to be made, or present the same as aforesaid; and such forfeiture shall be had and recovered by any party interested in the estate devised by such will, and by no other person, by action (m) of debt in the Circuit Court of Common Pleas, holden within and for the county where such will ought by law to be proved; and in case of such forfeiture being incurred as aforesaid, judgment may be rendered by the Court for any sum not exceeding sixteen dollars a month as aforesaid, for and during the time of delay above mentioned; and upon any such refusal of the executor or executors, the Judge of Probate shall commit administration of the estate of the deceased, with the will annexed, unto the widow or next of kin to the deceased, or one or more of the devisees, or in case of their refusal, to one or more of the principal creditors, as he shall think fit.

SECT. 12. *Be it further enacted*, That when a will shall be offered for probate to any Judge of Probate in this State, and the witnesses live out of the State, or more than thirty miles distant, or by reason of age or indisposition of body are unable to appear and give evidence in court, the deposition of such witness in writing taken before any person or persons duly authorized by dedimus potestatem (n) by such

year next preceding the commencement of the action. *Moore vs. Smith*, 5 *Glif.* 490.

2. If two executors are named in a will, the will not being filed, they may be sued jointly. *Hill & ux. vs. Davis & al.* 4 *Mass.* 137.

3. But if the neglect be in one only, he alone incurs the forfeiture, and is alone to be sued. *Ib.*

4. *Stebbins & al. vs. Lathrop*, 4 *Pick.* 33.

(m) 1. In such action it is not competent for the executor to prove that the will was revoked, this being a question exclusively of probate jurisdiction. *Moore vs. Smith*, 5 *Glif.* 490.

2. In the declaration it is necessary to allege, in the words of the Statute, that the neglect was "without just excuse made and accepted by the Judge of Probate for such delay."—And the want of this allegation is not cured by verdict. But it is not necessary to aver that the neglect was intentional. *Smith vs. Moore*, 6 *Glif.* 274.

(n) 1. A Judge of Probate cannot issue a *dedimus potestatem* in such case until the original will is filed with him. *Amory vs. Fellowes*, 5 *Mass.* 219.

Judge of Probate, shall have the same force and effect as though the witness was present, and testified in open Court. **CH. 51.**

**SECT. 13.** *Be it further enacted,* That where it shall clearly appear to the Judge of Probate either by the consent of heirs at law in writing, or by other satisfactory evidence, that there is no objection to the probate of any will, it shall be lawful for the said Judge, at his discretion, to decree probate thereof, upon the testimony of one or more of the three subscribing witnesses required by law, as the said Judge shall think proper, whether such witnesses are within the process of the said Judge or otherwise.

Judge may approve of a will in certain cases, on testimony of one or more witnesses.

[Mass. Stat. Feb. 24, 1818, § 33.]

**SECT. 14.** *Be it further enacted,* That (o) when the executor or any other person interested in a will that has been proved and\* allowed in a Court of Probate in any of the United States, or in a Court of Probate in any other State or Kingdom, pursuant to the laws of such State or Kingdom, shall produce a copy of such will, with a copy of the probate thereof, under the seal of the Court where the same will has been proved and allowed, unto any Judge of Probate in any county in this State, where the testator had estate, real or personal, whereon the same will may operate, and shall, in writing desire the same may be filed and recorded in the Probate Office in the same county, pursuant to this statute, the said Judge shall assign a time and place for taking the same into consideration, and shall cause notice thereof to be made in some public newspaper three weeks successively, thirty days at the least before the time assigned, to the end

[\*198]

Copy of wills proved in foreign Courts, may be filed, &c. in Probate Court of county where estate may be that is devised.

[Mass. Stat. June 29, 1785, § 2.]

Notice to be given.

2. If the deposition in such case is previously prepared by a party to the suit, it will not be received as evidence. *Ib.*

(o) 1. Notwithstanding the provisions of § 14, a will made and proved in a foreign country, prior to the enactment of this statute, may be filed in the Probate office, though attested by only two witnesses. *Crofton Ex'r vs. Isley*, 4 Glf. 134.

2. The Probate of such will is conclusive with regard to the lands devised, as it is with regard to chattels. *Dublin vs. Chadbourn*, 16 Mass. 433.

3. When administration is granted on a will proved in a foreign country, the administrator may be holden to pay the testator's debts to creditors here, but not to pay legacies, for which the legatee must resort to the country of the testator where the will was originally proved. *Richards vs. Dutch*, 8 Mass. 506.



CH. 51. that any person may appear and shew cause against the filing and recording the same ; and if at the time assigned no sufficient objection is made, the said Judge may cause the same copy to be filed in the Probate Office, and direct the same to be there recorded : saving always an appeal to any person aggrieved, to the Supreme Court of Probate. *And provided further*, That nothing in this act shall be construed to make valid any will or codicil that is not attested and subscribed in the manner the laws of this State direct, nor to give operation and effect to the will of an alien different from that which such will would have had before the passing of this act.

Appeal allowed.

Proviso as to operation of such wills.

[Ib. § 4.]

Executor to give bonds to return inventory, &c.

[†See *Hall vs. Cushing*, 9 Pick. 395.]

[Mass. Stat. Feb. 6, 1784, § 17.]

SECT. 15. *Be it further enacted*, That every executor named in a will hereafter to be proved, and taking upon himself that trust, shall give bond† to the Judge of Probate with sufficient sureties, resident in this State, to return upon oath a true and perfect inventory (*p*) of the testator's estate into the Probate office within three months, and to render an account (*q*) of his proceedings thereon, in the same manner administrators are by law obliged to do, unless such executor or executors are residuary legatees ; in which case bond (*r*)

(*p*) Where an executor or administrator refuses to return an inventory on being summoned, and in answer to interrogatories, denies that any personal property of the deceased has come into his hands, the only remedy for those claiming benefit from the estate, is, by action at law on the bond of the executor or administrator. *Boston vs. Boylston*, 4 Mass. 318.

(*q*) Executors are accountable for personal property, to the extent of debts, in the same manner as administrators are. See § 7 of ch. 470, copied below, note *r*, 3.

(*r*) 1. The giving of such bond does not divest the testator's creditors of the right to levy upon the lands of which he died seized. *Gore vs. Brasier*, 3 Mass. 523 ; *Wyman vs. Brigden*, 4 Mass. 150.

2. An executor in such case may sell the testator's real estate without license, and the court have not in such case power to grant a license. *Thompson vs. Brown & al.* 16 Mass. 179.

3. Ch. 470, § 7, Vol. 3, p. 315, provides further upon this subject, as follows :—

“That executors shall be accountable for the personal property of their testators as appraised, so far as necessary for the payment of debts and legacies in the same way and manner that administrators are made accountable, and may apply for license to sell so much thereof as may be necessary for the purpose aforesaid, in like manner as is provided for administrators. And wherever an executor is a residuary legatee, the condition of the bond which by

may be given by him or them to pay the debts and legacies of the testator ; and in case such executor or executors shall neglect or refuse, for the space of twenty days, to give bond as aforesaid, the Judge of Probate may commit administration of the estate of such testator, with the will annexed, to some\* other person, in like manner as he may grant the same when the executor refuses (s) the trust ; and when the executor is under the age of twenty-one years at the time of the probate of the will, administration may be granted with the will annexed during the minority of such executor. And where there are divers persons named executors, in any will hereafter to be proved, none shall act as such, but those who give bond as aforesaid.

CH. 51.

or to pay debts  
and legacies.  
Proceedings in  
case of neglect  
of executor—

[\*199]

and when he  
is a minor,

and when there  
are divers exe-  
cutors, &c.

SECT. 16. *Be it further enacted*, That when any person who shall hereafter be appointed executor of any will, shall, at the time of the probate of the same, live without this State, he shall before letters testamentary are issued to him, enter into bonds to the Judge of Probate for the county in which the testator lived, with sufficient sureties, being inhabitants of the said State, for his faithful performance of the trust reposed in him : and if such executor shall refuse to enter into such bonds, administration shall be granted with the will annexed, in the same manner as if such executor declined the trust.

Executor liv-  
ing without  
the State, to  
give bond in  
county where  
testator lived,  
&c.

[Mass. Stat.  
Oct. 23, 1782,  
§ 1.]

SECT. 17. *Be it further enacted*, That where the copy of any will which has been proved and allowed in any Probate Court in any of the United States or in any foreign State(t)

Effect of filing  
and recording  
copies of wills  
proved out of  
State.

law is provided that he may give, to pay debts and legacies shall be so far altered, as to require that an inventory shall be returned as in other cases, and where such inventory shall be legally returned, and the estate from any unexpected event, proves insufficient for the payment of debts, the same may be represented insolvent, and the executor, after having truly accounted for all the property and estate, in the same way and manner, that administrators are required to, in cases of insolvency, he and his sureties shall be permitted to plead in bar, to any action that may be brought on his bond, such insolvency and settlement of the estate."

(s) An executor, after probate of the will, accepting the trust and giving bond for its faithful execution, cannot renounce the trust. *Sears vs. Dillingham & al.* 12 Mass. 358.

(t) 1. An administrator with the will annexed, of one domiciled in Eng-

CH. 51. or kingdom, shall be directed to be filed and recorded in any Probate Court in this State pursuant to this act, the filing and recording thereof shall be of the same force and effect as the filing and recording of an original will proved and allowed in the same Court of Probate ; and the said Judge may thereupon proceed to take bond of the executor, or grant administration of the said testator's estate, lying in this State, with the will annexed, and settle the said estate in the same way and manner as by law he may or can the estates of testators, whose wills have been duly proved before him.

[Mass. Stat.  
June 29, 1785,  
§ 1.]

What notice  
must be given  
by executors  
and adminis-  
trators of their  
appointment.

[Mass. Stat.  
Feb. 14, 1789,  
§ 1.]

[\*200]

Mode of per-  
petuating evi-  
dence of such  
notice.

SECT. 18. *Be it further enacted*, That whenever an executor or administrator shall be appointed to the estate of any person deceased, and shall take upon himself that trust, by giving bond faithfully to discharge the duties thereof, as the law directs, he shall make known the same within three months, by causing notice thereof to be posted up in some public place in the town or plantation where the deceased was\* resident, and had his home at the time of his death ; and shall also give such further notice thereof as the Judge of Probate shall in writing direct. And if the deceased was neither an inhabitant nor resident within this State at the time of his death, the executor or administrator shall give such notice of his undertaking that trust, as the Judge of Probate that issued the letter of administration, or approved the will, shall in writing direct : and affidavit of the executor or administrator made and filed in the same Probate office, within seven months after undertaking that trust, accompanied with an original no-

land and dying there, coming into this State and filing the copy, &c. pursuant to § 17, and taking administration here with the will annexed, is not held to account here for effects received by him in England. *Boston vs. Boylston*, 2 Mass. 384. See, *Jennison vs. Hapgood*, 10 Pick. 77.

2. The executor of a will proved without the State cannot intermeddle with the effects of the testator in this State, but with the assent of the Judge of Probate within the State. *Goodwin vs. Jones*, 3 Mass. 521.

3. Nor can an administrator, so appointed without the State, prosecute or defend an action in the courts in this State, by virtue of such appointment. *Ib.*

4. Nor can he be sued as such, for the purpose of subjecting the real estate of the deceased to be taken in execution. *Borden vs. Borden*, 5 Mass. 77.

tification (or a copy thereof) of his undertaking that trust, and recorded in the Probate office, shall be admitted as evidence (u) of the time, place and manner notice was given. CH. 51.

SECT. 19. *Be it further enacted*, That when any executor of any last will and testament, or administrator of an estate, shall reside without this State at the time of taking upon him that trust, or shall afterwards remove out of this State and shall neglect or refuse, after due notice from the Judge of Probate to render his account and make a settlement of such estate with the creditors, legatees or heirs, or their legal representatives ; or when any executor or administrator shall become insane, or otherwise incapable of, or evidently unsuitable to discharge the trust reposed in him, the Judges of Probate in their respective counties within this State, are authorized and empowered to remove (v) from office such executor or administrator and grant letters of administration, with the will annexed (or otherwise as the case may require) to such person as to the said Judge shall seem meet. And the administrator thus appointed shall have the same power and authority to administer the estate of the deceased, not administered by such former executor or administrator, and be subjected to the same duties as if the executor or administrator were dead. And when a feme sole shall jointly with one or more persons, be appointed executrix, or administratrix, and after such appointment shall during the life of the other co-executor or co-administrator marry, such marriage shall not make the baron an executor or administrator in her right ; but shall operate as an extinguishment or determination of such woman's power\* and authority. And the other executor or executors, administrator or administrators, may proceed to discharge the trust reposed in them in the same way and man-

Executors and administrators living out of State, or removing after appointment, and neglecting to render account,

[Mass. Stat. Feb. 6, 1784, § 19.]

or becoming insane or unsuitable, may be removed.


Feme sole appointed co-executor shall lose her authority by intermarriage.

[\*201]

(u) Other evidence of the fact may properly be received, and, if satisfactory to the jury, is of the same avail. *Green vs. Gill*, 8 Mass. 113.

(v) 1. To an action against an administrator, it is a good plea in bar that since the commencement of the action, he has been removed from office by the Judge of Probate. *Jewett vs. Jewett*, 5 Mass. 275.

2. Although this statute seems predicated on the case of one executor only, yet it is within its reason and equity, that if one of two or more executors should fall within the disabilities specified, the remedy should be applied. *Winship vs. Bass & al.* 12 Mass. 200.

CH. 51.  ner as if such woman were dead (*w*). And the executor of an executor, shall not in consequence thereof, become an executor of the first testator ; but in every such case, administration may be granted upon the goods and estate of the first testator, unadministered, with the will annexed, to such person or persons as the Judge of Probate may think fit. And where there is more than one executor or administrator, and any or either of them shall be removed from office by the Judge of Probate for any of the causes mentioned in this section, the other executor or executors, administrator or administrators, may proceed to discharge the trust reposed in him or them, in the same manner, as if said executor or executors, administrator or administrators so removed were dead ; and may bring actions of account against them, and recover by any proper legal process such effects, and assets as remain in their hands unadministered at the time of their removal.

One or more executors, &c. may be removed in case, &c.

No administration to be granted on estate of less value than \$20.

[Mass. Stat. Mar. 9, 1784, § 9; Feb. 24, 1818, § 17.]

Disputed claims of executor or administrator may be referred before Judge.

SECT. 20. *Be it further enacted*, That no administration of the goods or estate of any deceased person, not administered upon by a former executor or administrator, shall be granted until it shall evidently appear to the Judge of Probate by the oath of the party applying or otherwise, that there is personal estate of such deceased person to the amount of twenty dollars or upwards, or debts of the like or greater value due from such deceased person unpaid, nor shall administration be originally granted upon the estate of any deceased person after the expiration of twenty (*x*) years from the death of such person.

SECT. 21. *Be it further enacted*, That when an executor or administrator shall exhibit a claim (*y*) in writing, against his testator or intestate, to the Judge of Probate, having cognizance thereof for allowance, and the same shall be disputed by any person interested adversely in the allowance thereof,

(*w*) 1. *Swan Admx. vs. Williamson*, 14 Mass. 295.

2. If she marry pending an action brought by several co-administrators, the action is not thereby abated. *Newell & als. vs. Marcy*, 17 Mass. 341.

(*x*) The grant of an original administration more than twenty years after the death of the intestate, is *ipso facto* void. *Hales vs. Willard*, 2 Mass. 120 ; *Holyoke vs. Haskins & ux.* 5 Pick. 25.

(*y*) The reference of a claim in favor of an executor or administrator, as such, is void. *Dana vs. Prescott*, 1 Mass. 200.

it shall be lawful for the said executor or administrator, and the legatees or heirs whose interest will be affected by the issue thereof, to submit the determination of such claim to referees who may be mutually agreed upon by the parties interested; and the Judge of Probate, before whom such\* submission is made, may receive, approve and allow the report of such referees, made in writing pursuant to the submission, and decree accordingly: *Provided*, The submission be made in writing, and signed by all the parties interested therein, or their agents duly authorized thereunto, and when any of the parties are minors, by his or their guardians duly appointed.

CH. 51.

[Mass. Stat.  
June 22, 1789,  
§ 1.]

[\*202]

Submission to  
be in writing,  
&c.

SECT. 22. *Be it further enacted*, That when a dispute shall arise respecting the occupation, use (z) and improvement of real estate in the hands of the executor or administrator, and the quantum he ought to credit in his account therefor, it shall and may be lawful for the Judge of Probate to appoint three disinterested persons living near the estate, to ascertain the true value thereof; and the report of them, or the major part of them, made thereupon, in writing, after hearing the parties and accepted by the Judge, shall be the sum the executor or administrator shall be charged with, in his account, and no more.

Income of real  
estate to be ap-  
praised by  
Committee ap-  
pointed by  
Judge.

[Ib. § 2.]

Administrator  
or executor to  
account for  
such income  
as appraised.

SECT. 23 (a). *Be it further enacted*, That the several

(z) 1. The provisions of § 22 do not recognize the right of executors and administrators to have the rents of the real estate, for the use of the creditors; but provides for the case, where they happen themselves to be occupants, by prescribing the mode, in which they ought to account, for the use of those to whom the same shall belong. *Gibson & al. vs. Farley & al.* 16 Mass. 287.

2. See note b 3, to § 1 of next chapter.

(a) 1. It is doubtful whether the provision of § 23 extends to executors and administrators. If it does, it extends only to an examination for the purpose of discovery. *Boston vs. Boylston*, 4 Mass. 318.

2. See note p, to § 15, of this chapter, retro, p. 226.

3. Under the provisions of § 23 and § 24, the Judge of Probate has power to call before him and examine under oath as well the executor or administrator of an estate, when suspected of embezzlement, as any other person. *O'Dee vs. McCrate*, 7 Glf. 467; *Higbee & al. vs. Bacon*, ad. 7 Pick. 14.

4 Such process can only result in a discovery of facts, to serve as the basis of ulterior proceedings. *Ib.*

**CH. 51.** Judges of Probate be, and hereby are empowered to convene before them any person that has been or may hereafter be entrusted by any executor or administrator with any part of the estate of the testator or intestate, who shall refuse upon a citation issued by the Judge of Probate for that purpose, to appear before him, and render a full account, upon oath of any money, goods or chattels, and of any bonds, accounts or other papers belonging to the estate of the testator or intestate, which he shall have taken into his hands or custody, and of his proceeding for and in behalf of such executor or administrator in his capacity as such. And if such person shall refuse to render account as aforesaid, such Judge may proceed against him in the way and manner herein directed for persons suspected of concealment, who refuse to answer interrogatories upon oath.

Judges may compel by citation, &c. persons entrusted with estate by executors or administrators to disclose on oath, &c.

[Mass. Stat. Mar. 4, 1784, § 12.]

Judges may call before them, &c. persons suspected of concealing or embezzling estate of persons deceased. [Ib. § 11.]

[\*203]

Judges may punish persons refusing to disclose, &c. by committing.

**SECT. 24 (b).** *Be it further enacted,* That each Judge of Probate within his county, be, and hereby is authorized and empowered to call before him and to examine upon oath, any person suspected by any executor or administrator, heir, creditor, legatee or other person having lawful right or claim to the estate of any person deceased, of having concealed,\* embezzled, or conveyed away any of the money, goods, or chattels left by the testator or intestate, for the discovery of the same. And if the person suspected as aforesaid, shall refuse to be examined, or to answer interrogatories, upon oath respecting the estate which he or she may be suspected of concealing, embezzling or conveying away, it shall and may be lawful for, and the said Judge is hereby empowered to commit such person, so refusing to be examined or answer interrogatories upon oath as aforesaid, unto the common gaol in the county, there to remain until he or she shall consent to be examined and answer interrogatories upon oath as afore-

5. The lapse of thirty years since the transactions inquired into, is no bar to the examination. *Ib.*

6. The executor may be held to answer under oath relative to all facts in his administration, but not respecting any conveyance of real estate to him in trust, by the testator, prior to his decease. *Ib.*

(b) See note a 3, 4, 5, 6, above.

said, or be released by the consent of the person suspecting him or her, or by order of the Supreme Judicial Court. CH. 51.

SECT. 25. *Be it further enacted*, That when the estate (c) of any person deceased shall be insolvent or insufficient to pay all just debts, which the deceased owed, the same shall be distributed to and among all the creditors (d) in proportion to the sums to them respectively due and owing, saving that debts due for taxes (e), and debts due to the State, and for the last sickness and necessary funeral expenses of the deceased, are to be first paid. And the executor or administrator appointed to any such insolvent estate before payment to any be made, (except as aforesaid) shall represent the condition and circumstances thereof unto the Judge of Probate. And the said Judge shall nominate and appoint two or more fit persons to be commissioners, with full power to receive and examine all claims of the several creditors; and such commissioners shall cause the times and places of their meetings to attend the creditors for receiving and examining their claims, to be made known by causing an advertisement thereof to be printed in such public newspaper or papers, or by such other notice as the Judge of Probate shall direct; and six months and such further time not exceeding eighteen months (f) in the whole, shall be allowed by the said Judge to the creditors to bring in and prove their claims; at the end of which limited time, such commissioners shall make their

Insolvent estates to be distributed *pro rata* among all the creditors; excepting that taxes, &c. are to be paid in full.

[Mass. Stat. June 15, 1784.]

[See ch. 470, § 8, Vol. 3, p. 316.]

Commissioners to receive and examine claims to be appointed; and to make known their time of meeting, &c.

From 6 to 18 months to be allowed to creditors, by the Judge, for procuring their claims.

(c) 1. The personal estate of a deceased person, in property attached, does not include any thing but the *surplus*, after satisfying the attaching creditor. *Grosvenor, adm. vs. Gold*, 9 Mass. 211.

2. See ch. 60, § 32, in this volume.

(d) 1. If a creditor to an insolvent estate has a mortgage as security for his debt, of less value than the amount of his debt, he can claim from the commissioners only for the difference between his debt and the value of the property mortgaged. *Amory vs. Francis, adm.* 16 Mass. 308.

2. Interest should be allowed on all debts by the commissioners, whether they expressly bear interest or not, from the time of the death of the party until they make their report. *Dodge & al. vs. Breed, adm.* 13 Mass. 538.

(e) See *Jennison vs. Hapgood*, 10 Pick. 77.

(f) *Walker vs. Lyman*, 6 Pick. 458.



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[\*204]  
 Compensation  
 for commis-  
 sioners,  
 [not exceed-  
 ing \$2 per di-  
 em; see ch.  
 470, § 2, Vol.  
 3, p. 313.]

Estate real and  
 personal to be  
 distributed a-  
 mong creditors  
 as allowed, &c.

report (g), and present upon oath a list of all the claims that shall have been laid before them, with the sum they shall allow on each claim unto the said Judge; and the Judge\* shall order them meet recompense† out of the deceased's estate for their care and labor in examining the claims; and the debts due for taxes, and debts due to the State, debts incurred for the last sickness of the deceased, and necessary funeral expenses as afore provided, being first deducted, shall order the residue and remainder of the estate both real and personal (the real estate being sold according to law) to be paid and distributed (h) to and among the creditors who shall

(g) It is the duty of the commissioners to make their own return to the Judge of Probate; and it is no part of the official duty of an administrator to receive it and carry or send it to the Judge of Probate; and if he should undertake it, it is merely a personal engagement for which the sureties in his bond are not bound. *Nelson vs. Woodbury & al.* 1 Glf. 251.

(h) It is further provided by ch. 470, § 8, Vol. 3, p. 316, as follows:—

“That whenever by a decree of distribution to the creditors of any estate represented insolvent, it shall appear that the assets in the hands of the executor or administrator are sufficient for the payment of the full amount of the claims allowed by the commissioners; and there shall afterwards appear to exist other just claims against such estate, not laid before the commissioners, and the executor or administrator shall be apprehensive that there may not be sufficient property belonging to the estate, to pay all such claims together with the charges of administration, he may make representation thereof to the Judge of Probate, and it shall be his duty to issue another commission of insolvency, returnable in sixty days, and like proceeding shall be had thereon as in other cases. And the Judge of Probate shall, upon another and final settlement of the administration account of such executor or administrator, which it shall be his duty to make within such time as the Judge shall direct, decree and order a distribution among such creditors in proportion to their several claims aforesaid, of the assets remaining after deducting the amount of the claims allowed by the first commission and charges of administration, the payment of which in full, shall in no wise be prevented by such subsequent representation of insolvency and the proceedings thereon. *Provided however,* That no creditor of such estate, where there may have been a decree of distribution founded upon a report of commissioners of insolvency as aforesaid, shall be entitled to have his claim allowed under such second commission, unless demand be made upon the executor or administrator for payment thereof, within three years next after his acceptance of his said trust, and he shall be in no wise liable to an action therefor after that time. And such second commission of insolvency shall not be issued, unless the representation by the executor or administrator herein provided for, be made within one month after the expiration of the said three years.”

have made out their claims with the commissioners as aforesaid, in proportion to the sums unto them respectively due and owing, saving unto the widow her right of dower in the real estate of the deceased, which dower unless the reversion shall be sold by the executor or administrator, and distributed with the other estate which the Judge may order if he see fit, upon application therefor at the expiration of her term shall also be distributed among the creditors aforesaid in like proportion : *Provided*, That notwithstanding the report of any commissioners, any creditor whose claim is wholly, or in part rejected, may have the same determined at the common law in case he shall give notice thereof in writing, at the Probate office within twenty days after such report shall be made, and bring and prosecute his action as soon as may be (i), and in case the executor or administrator shall be dissatisfied with any creditor's claim allowed by the commissioners, and shall give notice thereof at the Probate office, and also to the creditor, within twenty days as aforesaid, such claim shall by the Judge of Probate be struck out of the commissioners' report, unless such creditor shall commence and prosecute at the common law his claim as aforesaid as speedily as the same can be done, or unless the creditor and the executor or administrator shall agree before the Judge to submit the same to referees ; in which case the determination of the referees shall be final ; and when a claim shall be disputed in the course of the common law as aforesaid, execution shall not issue as in common cases, but the judgment of the Court respecting the same shall be the amount of the claim, and added to, or deducted from the commissioners' report, as the case may require. And no action brought against any executor or administrator after the estate shall be represented

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Saving widow's dower.

Reversion may be sold.

Creditor whose claim is not allowed by commissioners may have it determined at common law.

Mode of proceeding in such cases,

or such claims may be determined by referees.

No actions against executor or administrator

(i) 1. Neither the Judge of Probate, nor this Court, on an appeal from the Judge of Probate, can examine the merits of a claim against an insolvent estate, reported by commissioners ;—the only remedy in such a case is, for the party dissatisfied with the report, to file his objection as pointed out in § 25, and have the same determined at common law. *Gold vs. McMechan*, 1 Mass. 23 ; *Parsons vs. Mills & al.* 1 Mass. 431 ; *Ib.* 2 Mass. 80.

2. The suit at common law need not in every case be commenced at the next term of the C. C. Pleas, after disallowance. *Guild & al. vs. Hale*, 15 Mass. 455.

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[\*205]  
 Administrator of estate rendered insolvent to be sustained, unless, &c.

Actions brought before estate is rendered insolvent, to be continued, &c.

Creditors not making out their claims, &c. as before provided, to be barred, unless, &c.

Commissioners to examine

insolvent\*, shall be sustained, except for debts due to the State, debts due for taxes, for the deceased's last sickness and funeral charges, unless the executor or administrator having objection to the claim upon which such action shall be brought, shall consent to have the same settled by course of law, in which case the judgment of the Court shall determine the said claim, and it shall be reported by the commissioners, or be added to the list of claims by the Judge of Probate. And all actions (j) brought against any executor or administrator before the estate is represented insolvent, shall be continued until it shall appear whether the said estate is insolvent or not; and if found insolvent, the process shall be conducted as above provided. And if any creditor shall not make out his claim with the commissioners within the time of their commission, or at the common law, or before referees, in the manner this act provides, he shall be forever barred of his debt, unless such creditor shall find some estate of the deceased not inventoried or accounted for (k) by the executor or administrator before distribution, or unless it shall appear that such estate is not insolvent.

SECT. 26. *Be it further enacted*, That the commissioners who shall be appointed by any Judge of Probate, to re-

(j) An executor who, after an action brought against him represents the estate of the deceased to be insolvent, is not, by the act of June 15, 1784, entitled to a continuance of course, pending the commission of insolvency. *Blossom vs. Goodwin*, 1 Mass. 502.

(k) 1. In such case, the estate found must be such as the deceased died seized of, or of which he had been colorably or fraudulently disseized. *Johnson & als. vs. Libby*, adm. 15 Mass. 140.

2. The discovery of such estate by a creditor, does not give him a right of action against the administrator after four years, the time limited by § 26, of ch. 52, in this volume. *Id.*

3. Such discovery gives no right of action to the creditor, who makes it, and who has filed his claim with the commissioners of insolvency. *Wildridge vs. Patterson*, adm. ib. 148.

4. The statute gives an action only in favor of those who do not file their claims, and discover estate not inventoried or accounted for. *Manafield vs. Patterson*, ib. 492.

5. If the administrator refuses to administer such estate, the remedy is, a removal and new appointment. *Wildridge vs. Patterson*, supra.

ceive and examine the claims of the creditors to the estate of any person deceased, when represented insolvent, shall be and are hereby authorized and empowered to examine, by the oath or affirmation of the creditor, the truth of any claims (1) presented; and the said commissioners, when they are sitting by virtue of such commission, and when it shall be adjudged expedient by a majority of them, may require of such creditor an oath or affirmation, as follows :

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creditors under oath, as to their claims.

[Mass. Stat. Mar. 4, 1790, § 1.]

You do swear (or affirm as the case may be) that you will make true answers to the questions which shall be asked you by the commissioners relative to your claim against the estate of ——— (naming the deceased insolvent debtor) now under consideration. So help you God, (or this you do under the pains and penalties of perjury as the case may be.)

Form of oath.

And thereupon such commissioners may inquire of the truth of any writing, demand, or the charges in any accounts exhibited as a claim against such insolvent estate, and whether the same and every part of such claim remains due and\* unpaid, and may put such other questions relative thereto, as shall be material and tend to discover the truth of such claim.

[\*206]

SECT. 27. *Be it further enacted*, That any person who shall take such oath or affirmation, having been administered as aforesaid, and shall thereupon wilfully and corruptly make any false answer or answers to any question or questions material for the determination of the truth of the claim, in proof of which such oath or affirmation shall have been taken, and shall be thereof duly convicted, shall be adjudged guilty of the crime of perjury, and shall be liable to the pains and penalties which are or shall be by law inflicted for the punishment of such crime.

Violation of such oath to be deemed perjury.

[Ib. § 2.]

SECT. 28 (m). *Be it further enacted*, That whenever any executor of the last

(1) If on examination, the balance be *against* the creditor, it is not a subject for the commissioners' report, which is to include only claims against the estate. *McDonald vs. Webster*, 2 Mass. 499.

(m) 1. The provisions of § 28 apply to the cases where the creditor had already recovered his judgment against the administrator, before the estate was represented insolvent, as well as to those where the action was pending, or is afterwards commenced. *Ring vs. Burton, adm.* 5 Glf. 45.

2. Where an administrator, after judgment against him in that capacity, discovers new debts, and thereupon represents the estate insolvent, and proceeds regularly under the commission, the return of *nulla bona* on the execution does not support a suggestion of waste. *Ib.*

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When executor or administrator neglects to settle his account for six months after final report of commissioners, creditor may sue; and court shall give judgment and execution.

[Mass. Stat. June 20, 1794.]

[\*207]

Neglect by executor &c. to raise money &c. in certain cases shall be deemed waste.

[Mass. Stat. Mar. 4, 1784, § 8.]

Executor or administrator of deceased creditor may join with other creditors in

will, or administrator upon the estate of any person deceased, shall neglect to exhibit and settle his account (n) of administration with the Judge of Probate where the estate has been represented insolvent, and commissioners have reported to the Judge a list of claims, within six months after such report shall be made to the Judge, or within such further time as the Judge of Probate shall think proper to allow therefor, under his hand and seal, any creditor to such estate may commence and prosecute any action, or may prosecute any action then depending, for his demand against such executor or administrator; and the Court before whom such action may be depending, shall proceed to hear and determine the same and give judgment therein, and award execution thereon, in the same manner as if such estate had not been represented insolvent. And upon the return of such execution, duly made, that the executor or administrator refused or neglected upon due request, to satisfy the same, such refusal or neglect shall be deemed waste; and upon scire facias brought, judgment shall be rendered in favour of such creditor, to recover his debt with costs, and execution shall be awarded against the proper goods or estate of such executor or administrator, and for want thereof, against his body. And if in consequence of such refusal or neglect, the real estate of the deceased shall be levied upon and taken to satisfy such execution, it shall in like manner\* be deemed waste in the executor or administrator upon such estate (o).

SECT. 29. *Be it further enacted*, That when any executor or administrator shall neglect or unreasonably delay to raise money out of the testator's, or intestate's estate, or shall neglect to pay what he has in his hands, and by such neglect or delay shall subject the testator's or intestate's estate to be taken in execution, the same shall be deemed waste and unfaithful administration in such executor or administrator.

SECT. 30. *Be it further enacted*, That whenever it shall appear to any Judge of Probate, that any debtor to any estate, within his jurisdiction, is unable to pay all his just debts, and that it is reasonable that his creditors should discharge

(n) 1. The account here required relates to the personal estate only. *Butler vs. Ricker*, admr. 6 Glf. 263.

2. The neglect in such case authorizes an action on the administration bond, for the benefit of a creditor, besides the remedy against the proper estate of the administrator. *Coney vs. Williams & als.* 9 Mass. 115.

(o) § 28 repealed by § 4, of statute passed Feb. 26, 1833. The following is § 3, of the last mentioned statute :—

"SECT. 3. *Be it further enacted*, That whenever the Commissioners upon any estate, represented insolvent, shall have duly reported to the Judge of Probate a list of claims allowed, if the Executor or Administrator shall neglect to exhibit and settle his account of administration with the said Judge within six months after the report shall have been made as aforesaid, or within such further time as the Judge shall think proper to allow therefor, such neglect shall be taken and deemed conclusive evidence of the breach, by said Executor or Administrator, of his Probate Bond."

him from all demands, upon their receiving from him a fair and equitable dividend of all his estate, it shall be lawful for the executor or administrator of any deceased creditor, by the consent and approbation of such Judge, to join with those creditors who may agree in such discharge, and to sign the same upon such executor or administrator's receiving a just portion of said debtor's property to which the said deceased creditor would have been entitled.

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compounding  
with debtors,  
in certain ca-  
ses—by con-  
sent of Judge.

[Mass. Stat.  
Feb. 24, 1818,  
§ 21.]

SECT. 31. *Be it further enacted*, That whenever in the settlement of the estate of any person deceased, there shall be any real estate to be divided among his or her heirs or devisees, the Judge of Probate having jurisdiction (p) of the settlement of such estate, shall by warrant directed to a committee of three discreet and disinterested freeholders, who shall be under oath, cause such real estate situated in one or more counties in the State, to be divided among the heirs or devisees of the person deceased, pursuant to his or her will or to the laws regulating the descent and distribution of intestate estates, as the case may be ; and where such real estate cannot be divided among all the heirs or devisees, or their legal representatives, without great prejudice to or spoiling the whole, the said Judge may assign the whole (q) to one, or to so many of the heirs or devisees as the same will conveniently accommodate, always having due regard to the terms of any devise there may be in the case, and also pre-

Judge may  
cause real es-  
tate in one or  
more counties  
to be divided  
among heirs or  
devisees.

[Ib. § 24.]

Mode of pro-  
ceeding where  
estate cannot  
be divided  
among all the  
heirs without  
injury, &c.

(p) Where the Judge of Probate appointed commissioners to make partition of an intestate's estate among heirs, pending a petition for partition instituted by some of the heirs, and an action by the widow of the intestate for her dower, the decree appointing the commissioners was reversed by the Court. *Stearns & als. Appls. vs. Stearns & als.* 16 Mass. 167.

(q) 1. The Judge of Probate has no authority to assign the reversion of the widow's dower to one of the heirs, to the exclusion of the rest. *Sumner vs. Parker*, 7 Mass. 79.

2. A decree of the Judge of Probate, allowing the return of commissioners for dividing the real estate of an intestate among his heirs, &c. and who had assigned the whole to one, she paying to the other heirs respectively a certain sum, although void as to one of the heirs who had no notice, was held good as to another, who had assented to the assignment, and had received the sum awarded to her by the commissioners. *Rice & ux. vs. Smith*, 14 Mass. 431.

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[\*208]

No conveyance by heirs or devisees to prevent division under the authority of Judge.

When dower is to be assigned, or partition ordered, and such estate lies in common, Judge to order the deceased's estate to be

ferring males to females, and among the children of the deceased, elder to younger sons; and if any heir or heirs, devisee\* or devisees to whom any real estate shall be so assigned, shall not accept the same and make, or secure payments to be made, as the said Judge of Probate shall direct(r), then, and in such case the same may be so assigned to one or more of the other heirs or devisees successively; in every case the heir or heirs, devisee or devisees to whom the same estate shall be assigned as aforesaid, paying to the other heirs or devisees, their heirs or assigns, their proportionable shares of the true value thereof on an appraisement to be made by such committee, or giving such sufficient security to pay the same, and in such convenient time or times as the said Judge of Probate shall direct, with lawful interest until paid. And no conveyance made by any heir or devisee, of his or her interest or estate in the lands of any testator or intestate, shall take from such Judge of Probate his jurisdiction and authority to divide and assign the real estate of any testator and intestate among his or her heirs or devisees, in manner aforesaid (s).

SECT. 32. *Be it further enacted*, That when the Judge of Probate shall issue such warrant for the purposes aforesaid, or for the assignment of dower (t) in any such real estate, and such real estate shall lie in common and undivided with that of any other person or persons, the said Judge shall direct the committee named in such warrant, first to sever

(r) 1. A bond given to the Judge of Probate, in such case, is extra official, and not such a probate bond as authorises an original suit upon it in this court; the security ought in such case to be given to the heirs. *Thomas vs. White*, 12 Mass. 369.

2. A decree of the Judge of Probate, assigning the whole real estate to the eldest son, on condition that he pay to the other children the value of their respective shares in money within three years, but without taking security for the same, may be avoided by the other children, as not authorised by this statute; and without appealing from such decree. *Newhall vs. Sadler*, 16 Mass. 122.

(s) See *Pond & als. vs. Pond & als.* 18 Mass. 418, and *Proctor vs. Newhall*, 17 Mass. 90, in connection.

(t) See ch. 40, § 3, p. 168 of this volume.

and divide the estate of the deceased from that of such other person or persons, the said committee first giving timely notice to all parties interested in said estates, that they may be present if they see fit at the making of any such divisions.

SECT. 33. *Be it further enacted*, That such division of any such real estate, made as aforesaid, and accepted by the said Judge of Probate, and recorded in the Probate office of the same county shall be binding on all persons interested ; *Provided nevertheless*, That when any minor or any person non compos mentis, or otherwise incapable to take care of their estates, or any persons who shall be out of the State, are interested either in the estate of such deceased person, or in the estate with which it so lies in common, guardians shall be appointed for such minors, persons non compos, or otherwise incapable ; and some suitable person shall be appointed for such absent persons by the said Judge before such\* division, to represent and act for them respectively in the making thereof : *And provided also*, That before an order for such division shall issue, it shall be made to appear to the said Judge of Probate, that the several persons interested in such estate, if living within the State, and the attorney, if any, or other suitable person or persons, appointed as aforesaid, of such as may be absent from the State, have had such due notice of such partition as the said Judge shall have ordered and have had opportunity to make their objections to the same (u) : *Provided also*, That where an estate is devised, it shall be lawful for the said Judge to order the whole or that part of it whereof partition is applied for, to be divided among the devisees, according to their true proportions thereof, by said committee.

SECT. 34. *Be it further enacted*, That every committee appointed to make division as aforesaid, and the appraisers and commissioners appointed by the Judge to perform any service respecting the estate of any person deceased, or persons appointed to set off the widow's dower (v)

(u) Under the general words in this *second* proviso, the guardians and agents before mentioned, are included among those to be notified. *Smith vs. Rice*, 11 *Mass.* 511.

(v) In the assignment of dower, commissioners are only to regard the

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severed by committee, they giving notice, &c. [Ib. § 25.]

Such division recorded, &c. to be binding.

Provision for appointment of guardians for minors, &c. and agents for persons absent.

[Ib. § 26.]

[\*209]


Notice to be given before ordering such division.

Division to be in whole or part, &c.

Committee, appraisers, commissioners &c. to be under oath.

[Ib. § 27.]



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Partitions of real estate so made and accepted, to be valid, unless altered on appeal.

[Ib. § 28.] No partition to be ordered when proportions, &c. appear disputable.

**SECT. 35.** *Be it further enacted,* That all such partitions of real estate made, accepted and recorded as aforesaid, shall be valid in law to all intents and purposes, unless upon the appeal (w) of any party aggrieved thereby, the same should be reversed or altered by the Supreme Court of Probate; but no partition shall be ordered by any Judge of Probate under this act, when the proportions of the heirs or devisees, or any of them, shall be disputable by the tenor of the will in the case, or any other matter in writing from which it shall appear that the proportions are uncertain, and ought in the opinion of said Judge first to be legally ascertained.

[\*210] When messuage, &c. is of greater value than one's share, committee may assign it to one, he paying the surplus to the party deficient.

[Ib. § 29.]

**SECT. 36\*.** *Be it further enacted,* That when any messuage, tract of land or other tenement, shall be of greater value than the share of any party in any real estate, to be divided as aforesaid, and the same messuage, tract of land, or other tenement, cannot without great inconvenience be sub-divided, the same may be assigned to one of the parties only, such party paying such sum or sums of money to the other parties, who in consequence thereof have less than their shares of such real estate so divided, as the committee appointed to divide the same shall award, and at such time and manner as the Judge of Probate shall direct.

Parties refusing to pay expenses of partition may be

**SECT. 37.** *Be it further enacted,* That when any partition shall be made as aforesaid, and any one or more of the parties interested in the estate descended or devised, shall

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rents and profits. *Leonard vs. Leonard*, 4 Mass. 533; See also, *ch. 40*, and notes thereto, p. 168 of this volume.

(w) By an appeal, in such case, the return of the commissioners is open to every objection that could lawfully have been made to its acceptance in the court below. *Sever app. vs. Sever*, 8 Mass. 132.

neglect or refuse to pay their just proportion of the charges attending the same partition, it shall be lawful for the said Judge of Probate to issue a warrant of distress against such delinquent for the amount of such proportion and costs of such process : *Provided always*, That an account of such charges be first exhibited to the said Judge, and the just proportion of such party so interested, be settled and allowed, such party having had due notice to be present at the settlement and allowance thereof.

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compelled, the expenses being first allowed.

[Ib. § 30.]

SECT. 38. *Be it further enacted*, That in case of any division and settlement of real estate, pursuant to the warrant of a Judge of Probate in manner aforesaid, it shall be lawful for such Judge to order a division of the reversion (x) and remainder expectant upon determination of any estate in dower in like manner as the division of the other parts of such estate : and the division of such reversion and remainder shall be ordered and made, either at the same time with the division of the other parts of such real estate, or upon the determination of the estate in dower, at the discretion of the said Judge, whether such estate in dower shall be determined by the decease of the tenant in dower, or by the voluntary relinquishment thereof, or in any other manner.

Reversion, &c. may be divided.

[Ib. § 31.]

SECT. 39. *Be it further enacted*, That in the settlement of intestate estates, whether they be solvent or insolvent, the widow shall be entitled to her apparel, and such other (y) and so much of the personal estate as the Judge of Probate shall determine\* necessary, according to her quality and degree ; regard being had to the state of the family under her care. And in cases where such allowances shall have been made from intestate estates, represented to be insolvent, which ultimately appear to be solvent (z), the Judges of Probate, bc, and hereby are respectively authorized by a subsequent decree to

Widow entitled to necessities, &c. in settlement of intestate estates, solvent or insolvent.

[\*211]

[Mass. Stat. Mar. 12, 1806, § 2, and Dec. 13, 1816, § 1.]

(x) See ante, note q, 1, to § 31.

(y) The whole of the personal estate may be allowed to the widow, unless the amount thereof would make the allowance extravagant ; and in such case the charges of administration may be deducted from the proceeds of real estate sold to pay intestate's debts. *Braser vs. Dean & al.* 15 Mass. 183.

(z) Carrier's case, 3 Pick. 375, and note j, to § 15, p. 156, of this volume. See also, *Stearns & al. vs. Stearns & al.* 1 Pick. 157.

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Further allowance in case.

In estates testate and insolvent allowance to widow.

In all insolvent estates where there is no widow, allowance may be made to minors, of personal estate.

Advances, &c. made to children, &c. shall be estimated in partition and distribution of estates.

[Mass. Stat. Mar. 12, 1806, § 3.]

make such further allowances to the widow from the personal estate of her husband, having regard to what shall have been allowed as he shall deem reasonable. And whenever a testate estate shall be insolvent, the Judge of Probate shall have the same authority to allow personal estate to the widow as he possesses in case of estates intestate; and in all cases of insolvency of estates whether testate or intestate, if there be no widow, the Judge of Probate shall have the like authority to make an allowance of personal estate to the children of such deceased persons who are minors.

SECT. 40. *Be it further enacted*, That all gifts or grants made by the intestate, to any child or grand child, of any estate, real or personal, in advancement (a) of the portion of such child or grand child, and which shall be expressed in such gift or grant, or otherwise charged by the intestate in writing, or acknowledged in writing by the child or grand child, as made for such advancement, such estate, real and personal shall be taken and estimated in the distribution and partition of the intestate's real and personal estate as part of the same, and the estate so advanced, shall be taken by such child or

(a) 1. Where one by deed, purporting to be for a valuable consideration, conveyed to his son certain lands, and the son, by his deed of the same date, acknowledged himself satisfied as his share of his father's estate, acquitted and discharged the estate from any demand thereon as heir; the son died, afterwards the father died intestate; the grand children and heirs of the son bring their action for their distributive shares of their grandfather's estate, and it was held an *advancement* to the son in full, and the grand children were barred. *Quarles & als. vs. Quarles*, 4 Mass. 680.

2. In such case the release shall operate as a bar, although it may appear that the sum advanced was much less than the heir's share in the estate. *Kenny & ux. vs. Tucker*, 8 Mass. 143.

3. Interest is not chargeable on monies advanced to a child by his parent. *Osgood vs. Breed*, 17 Mass. 356.

4. It is proper to charge the advancement, if made in money or chattels, first against the personal estate. *Bemis & al. vs. Stearns & al.* 16 Mass. 202.

5. *Whitman vs. Hapgood*, 10 Mass. 437.

6. No particular form of words is required to constitute an advancement. Nor can an advancement be proved by parol. *Bulkeley & al. vs. Noble*, 2 Pick. 337. See also, *Ashley applt. &c.* 4 Pick. 28; *Bullard vs. Bullard*, 5 Pick. 527.

grand child towards his share of the intestate's estate. And the value at which such estate shall be so taken, shall be the same as above expressed or charged by the intestate, or acknowledged by the child or grand child, if any value be so expressed, charged or acknowledged, otherwise at the value thereof when given.

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Mode of estimating.

SECT. 41. *Be it further enacted*, That in the distribution of the personal estate, alienage in the person claiming a distributive share thereof, as issue, widow or otherwise, shall be no impediment to such person's receiving the same.

Alienage no impediment to receiving share of personal estate.  
[Ib. § 4.]

SECT. 42. *Be it further enacted*, That whenever any heir or legatee shall be entitled to demand any distributive share or legacy in any estate, the executor or administrator of such\* estate may, before payment of such distributive share or legacy, require bonds to be given to himself, if the Judge of Probate shall deem it reasonable, with such surety or sureties as the said Judge shall approve, by the parties or any of them who shall demand payment of such distributive shares or legacies, with condition, that the party or parties, to whom the same shall be paid, shall refund a proportional part of such estate, or otherwise indemnify such executor or administrator against any demands which may be made against the testator or intestate respectively (b).

Executor or administrator may require bond of indemnity from heirs, &c. demanding share or legacy if Judge deem it reasonable before payment.  
[\*212]

[Mass. Stat. Feb. 24, 1818, § 22.]

SECT. 43. *Be it further enacted*, That any executor being a residuary legatee, may bring an action of account against his co-executor or co-executors of the estate of the testator

Executor, if residuary legatee may have action against co-executor.

(b) It is provided by ch. 470, § 9, Vol. 3, p. 317, as follows:—

“SECT. 9. *Be it further enacted*, That whenever the executor or administrator of any estate, shall pay to any creditor, heir or devisee of such estate, any sum exceeding thirty dollars on account of a debt due from such estate or in pursuance of a devise, or a decree of distribution among the heirs of such estate, he shall have a right before payment to require of every such creditor, heir or devisee, a bond in the sum so to be paid with reasonable and sufficient surety, conditioned to refund so much of the sum paid as aforesaid as, upon a final settlement of the estate, the same shall appear to exceed the proportion or amount to which such creditor, heir or devisee is legally and justly entitled. *Provided*, That such bond shall not be required when such payment is made under a decree of distribution to creditors. *And provided also*, That the bond herein provided for, shall not be required unless the Judge of Probate, upon an examination into the circumstances of the estate, shall so order and determine.

CH. 51. in his or their hands, and may also sue for, and recover his equal and proportionable part thereof; and any other residuary legatee shall have like remedy against the executors. And any person having a legacy given in any last will, may sue for, and recover the same at the common law (c).

[Mass. Stat. Feb. 6, 1784, § 17.]  
~~Legatees may sue executor at common law.~~

~~Who shall be considered executors in their own wrong.~~

[lb. § 16.]

SECT. 44. *Be it further enacted*, That if any person shall alienate or embezzle any of the goods or chattels of any deceased person before he or she have taken out letters of administration, and exhibited a true inventory of all the known estate of the person deceased, every such person shall stand chargeable and be liable to the actions of the creditors and other persons aggrieved, as being executors in their own wrong (d).

One administrator may in certain cases have an action of account against his co-administrator.

[Mass. Stat. Feb. 24, 1818, § 15.]

SECT. 45. *Be it further enacted*, That where two or more persons have letters of administration granted them of any intestate estate, and one or more of them take all or the greatest part of such estate into their hands, and refuse to pay the debts or personal charges of such intestate, or refuse to account with the other administrator, then, and in such case it shall be lawful for such aggrieved administrator to bring his action of account against the other administrator or administrators, and recover his proportionable share of such intestate's estate as shall belong or appertain to him.

Judge to allow guardians to be chosen by minors of 14 years of age, and to appoint guardians to those under 14.

[\*213]

SECT. 46. *Be it further enacted*, That the Judge of Probate in each county be and he is empowered to allow of guardians that shall be chosen by minors of fourteen years of\* age, and to appoint guardians(e) for such as shall be under that age, who shall give bond with sufficient sureties resident

(c) 1. See note p, to § 15, p. 226, of this volume.

2. See last note to § 72 of this chapter.

(d) 1. An execution against an executor in his own wrong, cannot be levied on lands of which the intestate died seized. *Mitchell vs. Lunt*, 4 Mass. 654.

2. To a scire facias on a judgment against an executor in his own wrong, it is a good plea in bar of execution, that the defendant has taken letters of administration, that the estate is insolvent, and that a decree of distribution has been proved in Probate court. *Shillaber vs. Wyman*, 15 Mass. 322.

(e) Where one gives a promissory note as guardian, he is liable personally for the payment of it. *Forster vs. Fuller*, 6 Mass. 58.

in this State, for the faithful discharge of their trust, to return a true and perfect inventory of the estate of such minor upon oath within three months, and to account either with the Judge or minor when such minor shall arrive to the age of twenty-one years, or at such other time as the Judge shall direct (*f*). And when any minor above the age of fourteen years shall be cited by the Judge of Probate to choose a guardian, and such minor shall refuse or neglect to appear, or appearing, shall refuse to choose a guardian, or any guardian chosen by such minor shall be unable to give bond as aforesaid, or shall refuse the trust; or when any minor above the age of fourteen years shall be without this State, in every such case the Judge of Probate shall have the same power to appoint a guardian as though such minor were under the age of fourteen years: *Provided nevertheless*, That when a minor above the age of fourteen years living more than ten miles distant from the Probate office, shall choose a guardian, such minor may have that choice certified to the Judge by any Justice of the Peace in the same county: *Provided*, No executor or administrator on an estate, shall be appointed guardian to any minor interested therein.

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Guardians to give bond; to return inventory account, &c.

[Mass. Stat. Mar. 10, 1784, § 1 & 2.]

Minors above 14 may, if more than 10 miles distant from Probate office, have their choice certified by Justice of Peace, &c.

SECT. 47. *Be it further enacted*, That every guardian, who shall be appointed to any minor having real estate, goods

Guardians to return inventory.

(*f*) 1. Ch. 470 § 10, Vol. 3, p. 317, provides as follows:—

"SECT. 10. *Be it further enacted*, That every guardian shall render and settle his account with the Judge of Probate in their respective counties once in three years, and as much oftener as cited by said Judge for that purpose, and on neglect or refusal to settle his account as aforesaid, it shall be deemed and held a breach of his bond and a sufficient cause for his removal from said trust, and he shall also forfeit his claim to an allowance for personal services, unless it shall appear to the Judge of Probate, that such neglect arose from sickness or other unavoidable accident. And it shall be the duty of Judges of Probate on the settlement by any guardians of his account as aforesaid, if prior to his becoming legally discharged, to examine his guardianship bond, and if the sureties therein have become insufficient, or the same is insufficient in the penal amount, a new bond shall be required with such sureties as the Judge shall decide to be sufficient. And in case any guardian shall neglect to furnish such new bond within such time as said Judge shall order, he shall be removed and some other suitable person appointed in his place."

2. See notes to § 49, of this chapter.

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[Mass. Stat.  
Feb. 24, 1818,  
§ 84.]

Guardians  
may, in cer-  
tain cases pur-  
chase remain-  
der or rever-  
sion of tenant  
in dower, for  
benefit of mi-  
nor.

[Ib. § 31.]

[\*214]

Proviso.

Judges to ap-  
point guardi-  
ans to non  
compos, luna-  
tic, idiots, &c.

[Mass. Stat.  
Mar. 10, 1784,  
§ 8.]

If selectmen,  
after inquisi-  
tion, certify  
them to be in-  
capable, &c.

and chattels, rights or credits, shall be required to return up-  
on oath into the Probate office a true and perfect inventory (g)  
of all such real estate, goods and chattels, rights and credits,  
within three months.

SECT. 48. *Be it further enacted*, That the guardian of  
any minor having a right in reversion or remainder in and to  
any estate set off to the widow of any deceased person, as  
and for her dower, may, with the consent of the Judge of  
Probate having jurisdiction of the settlement of such estate,  
purchase from the tenant in dower or her assigns, her or their  
interest in the same, for the benefit of such minor, and from  
his or her personal estate. And all monies, so applied, may  
by such guardian, be charged to such minor in account; and  
all the rents and profits of such estate shall be credited to the  
minor, in like manner as the rents and profits,\* which arise  
from his or her other estate: *Provided always*, That it be  
satisfactorily proved to the Judge of Probate, that such pur-  
chase will be for the manifest advantage of such minors.

SECT. 49. *Be it further enacted*, That the Judges of  
Probate, within their respective counties, upon request made  
by the friends, relations or creditors of any idiot, *non compos*  
or lunatic person, or by the Overseers of the poor in such  
town where such idiot, *non compos*, or lunatic person lives,  
or is an inhabitant, may direct the Selectmen of such town to  
make inquisition(h) thereinto, and if the person said to be an  
idiot, lunatic or distracted person, shall be adjudged by the  
Selectmen of the town (or the major part of them) where  
such person resides, to be incapable of taking care of him or

(g) It is farther provided by § 3, ch. 470, Vol. 3, p. 314, as follows:—

"SECT. 3. *Be it further enacted*, That the respective Judges of Pro-  
bate shall have power to appoint, at their discretion, appraisers as now  
provided by law, to be under oath, in all cases, when any estate shall come  
to the knowledge or possession of any executor, administrator or guardian,  
after he shall have returned an inventory into the probate office; the war-  
rant in such case, and in all cases for the appraisement of minor's estate, to  
be made returnable at such time as shall be therein directed."

(h) An inquisition by the selectmen, that one is *non compos*, and an ap-  
pointment of a guardian for that cause, are not justified by evidence that the  
person is old, and has become less careful of his property. *Darling app. vs.*  
*Bennet*, 8 Mass. 129.

herself, and they shall certify the same under their hands, to the Judge, the said Judge of Probate after giving due notice to such idiot, *non compos*, or lunatic person, shall be empowered to appoint some suitable person or persons to be guardian or guardians to such idiot, lunatic, *non compos* (i) or distracted person, directing and empowering such guardian or guardians to take care of the person and estate, both real and personal, of such person, to make a true and perfect inventory (j) of the said estate upon oath, to be returned into and filed in the Probate office in such county (k).

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Guardians, so appointed, to take care of the persons and estates, and return inventory, &c.

(i) 1. A letter of guardianship of a *non compos*, issued agreeably to the provisions of § 49, is *prima facie* evidence that the ward was not of sound mind. *White adm. vs. Palmer*, 4 Mass. 147.

2. But if a lunatic under guardianship be restored to his senses, he may make a will, although the letters of guardianship be unrepealed. *Stone appt. vs. Damon and als.* 14 Mass. 488.

3. The guardian of a *non compos* who dies pending a suit against him, cannot continue to defend, but the administrator must defend if the action survives. *Whitney vs. Whitman*, 4 Mass. 508.

4. A *non compos* under guardianship is still liable to be sued in a civil action, and to be committed in execution. *Leighton ex parte*, 14 Mass. 207.

(j) See note f, to § 46. It is also further provided by ch. 470, § 11, vol. 3, p. 318, as follows:

"SECT. 11. *Be it further enacted*, That every guardian appointed to any idiot, *non compos* or lunatic person, or to any spendthrift, shall give bond to the Judge of Probate, with sufficient sureties, resident within the State, for the faithful discharge of his trust, to render a true and perfect inventory of the estate, property and credits of his ward within three months, as appraised by three suitable persons under oath, to be appointed by the Judge of Probate; and to render a just and true account of his guardianship as often and whenever by law required†; and at the expiration of his trust, to pay and deliver over all monies and property, which on a final and just settlement of his accounts, shall appear to be remaining in his hands."

(k) 1. Provisions similar to those of § 49, are extended to the case of "any person who has rendered, or shall render himself or herself incapable of managing, directing, or properly taking care of his or her estate, either personal or real, by excessive drinking, gaming, or debauchery." See *statute passed Feb. 18, 1832*.

2. It is the duty of the Judge of Probate before appointing a guardian to one as a lunatic, *non compos*, &c. to give notice to the party that he may be

†See *Curtis, app. vs. Bailey*, 1 Pick. 198.



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Proceedings  
against per-  
sons suspected  
of embezzle-  
ment of prop-  
erty belonging  
to idiots, non  
compos, &c.

[Ib. § 4.]

Guardians of  
such persons  
to manage  
their estate  
frugally, and  
support them  
comfortably—  
[\*215]

[Ib. § 5.]

collect debts,  
&c.

and pay debts  
previously con-  
tracted.

SECT. 50. *Be it further enacted*, That the Judges of Probate in their respective counties, are authorized and empowered, upon the complaint of any heir<sup>(l)</sup>, creditor or other person having lawful right or claim in expectancy to the estate of any idiot, lunatic, *non compos* or distracted person, or the guardian or guardians, to proceed with any person or persons suspected of concealing, embezzling, or conveying away any of the money, goods or chattels of such idiot, lunatic, *non compos* or distracted person, in the same way and manner as is by law prescribed for persons suspected of concealing, embezzling or conveying away the money, goods or effects of deceased persons.

SECT. 51. *Be it further enacted*, That the guardian or guardians appointed as aforesaid, shall improve frugally and without waste and destruction, the estate of the idiot, *non compos*, lunatic or distracted person, and apply the annual income\* and profits thereof for the comfortable maintenance and support of the said idiot, lunatic, *non compos*, or distracted person, and also of his or her household or family; and the said guardian or guardians are hereby empowered to settle accounts, receive, sue for, and recover all just debts due to the said idiot, lunatic, *non compos*, or distracted person, from any person or persons whomsoever, and to manage, improve or divide the real estate in as full and ample a manner as the said idiot, lunatic, *non compos* or distracted person might or could do, were he restored to the full use of his reason; and shall also be subject to the payment of all just debts<sup>(m)</sup> owing by such person which were contracted before his distraction, out of his personal estate, or in case that be insufficient, then out of the real estate, being first empowered to make sale<sup>(n)</sup> thereof by any Court having power to grant li-

heard on the question, whether such appointment be necessary or proper. *Chase, appt. vs. Hathaway*, 14 Mass. 222.

(l) An uncle and next friend of a *non compos*, cannot, as such, sustain an appeal from the probate court against the guardian, without showing himself to be heir, or creditor, &c. *Penniman vs. French*, 2 Mass. 140.

(m) See note *e*, to § 46.

(n) 1. See note *k*. 2, of ch. 36, p. 143, of this volume.

2. See § 3, of next chapter.

cense for that purpose, in the way and manner executors or administrators are empowered to make sale of the real estate of deceased persons. And in case the income or improve- CH. 51.

3. If it be for the interest of the ward, the court may license the guardian to sell real estate for the payment of debts and incidental charges, notwithstanding there may be personal estate. See *ch. 224, Vol. 3, p. 57*; also, *ch. 470, § 4, Vol. 3, p. 814*, which is as follows :

“SECT. 4. *Be it further enacted*, That the Judges of Probate for their respective counties, shall have power to grant license to guardians of minors, persons non compos and spendthrifts, to sell the real estate of their wards, where necessary for the payment of debts and for their support, legal expenses and charges of sale, and may include in such license in anticipation of accruing expenses, in cases of support, a sum not exceeding one hundred dollars. And where it shall be necessary for the purposes aforesaid, or for the payment of debts, that a guardian should be authorized to sell some part of the real estate of his ward, or that an executor or administrator should be authorized to sell some part of the real estate of testator or intestate, for the payment of debts or legacies, and by a partial sale the residue thereof, would be greatly injured, the said Judges of Probate respectively, may authorize said guardian, executor or administrator, to sell and convey at public auction or private sale, the whole of such real estate or such entire parts thereof as will not injure the residue ; said Judges observing the provisions of law respecting the granting of licenses for the sale of real estate. And every guardian, executor and administrator, licensed to sell real estate, shall give notice of such sale as required by law, whether authorized to sell at public auction, or private sale. *Provided*, The right to an appeal shall be allowed as in other cases.”

4. It is further provided by § 1, of statute passed Feb. 26, 1833, as follows:

“That whenever any minor or minors or person, *non compos*, shall have any title or interest in any real estate, situated within any county of this State, and it shall be made fully to appear to the Judge of Probate of said county, that it would be for the benefit of such minor or minors or person, *non compos*, that the same should be disposed of, and the proceeds thereof put out at interest, the said Judge may authorize the guardian or guardians, or some other suitable person or persons, to sell and convey said estate, or any part thereof, by deed or deeds duly executed, acknowledged and recorded. And the person or persons, authorized as aforesaid, shall be held to give to said Judge such bond, and take such oath, and proceed, in all respects, in such manner, as is now required of persons, licensed by the Supreme Judicial Court for like purposes.”

5. Under the statute of March 10, 1784, the Court have no authority, to license the sale of the real estate of spendthrifts, by their guardians. *Pet. of Tucker, 2 Mass. 157.*

6. Guardians of spendthrifts have no control of the persons of their wards nor authority to bind them out. *Boyden vs. Boyden, 5 Mass. 427.*

**CH. 51.** ment of the personal and real estate of such persons shall not be sufficient to support them, the Court aforesaid may license and authorize the guardians to make sale of the whole or part of the real estate of such person for that purpose, as occasion may require. And in case any such idiot, lunatic or distracted person shall be restored to the use of his reason, the residue and remainder of the estate, real and personal, shall be returned and delivered to him, or in case of his death, to his heirs, executors or administrators; the guardian or guardians having first such reasonable allowance out of the same for their charge and trouble as the Judge of Probate shall order.

Apply to Courts for license to sell real estate, if necessary:  
[See ch. 470, § 4, Vol. 3, p. 314.]  
and account with their wards, if restored to reason, &c. or if dead, with their heirs, &c.

Judge may appoint guardians for children.

[Ib. § 7.]

**SECT. 52.** *Be it further enacted,* That the Judges of Probate in their respective counties may appoint guardians for the children of lunatics, idiots, *non compos*, or distracted persons, in the same manner as though their parents were dead.

Judge may appoint guardians to spendthrifts, idlers, &c.

[Ib. § 8, and Feb. 11, 1819.]

[\*216]

Mode of proceedings in such cases.

**SECT. 53.** *Be it further enacted,* That when any person by excessive drinking, gaming, idleness or debauchery of any kind, shall so spend, waste or lessen his or her estate, as thereby to expose himself or herself, or his or her family to want; or shall by thus spending, wasting or lessening his or\* her estate, endanger or expose the town to which he or she belongs, in the judgment of the Selectmen thereof, to charge or expense for the maintenance or support of him or her, or his or her family, such Selectmen, or the major part of them, shall make a complaint in writing to the Judge of Probate for the county to which the person so spending, wasting or lessening his estate, doth belong; and if it shall appear to the said Judge of Probate, that the person complained of comes within the description of this act, and has had due notice of the complaint exhibited against him or her, the said Judge of Probate shall appoint the said Selectmen (o), or the major part of them, or some suitable and discreet person or persons, guardian or guardians to such person. And whenever the Selectmen of any town or a major part of them, shall make application to the Judge of Probate

Conveyances by spendthrifts after applica-

(o) Selectmen so appointed do not cease to be such guardians on the expiration of the period for which they were elected to the office of selectmen. *Russell & al. vs. Coffin*, 8 Pick. 143.

for the appointment of a guardian to any person, who by excessive drinking, gaming, idleness or debauchery, is wasting his estate, and the Judge of Probate shall, by his decree, order notice to the person complained against, the complainants may file a copy of their said complaint, with the order of the Judge of Probate thereon, in the office of the Register of Deeds for the same county, or after the appointment of such guardian, if no such copy shall have been so filed as aforesaid. And in case a guardian shall be appointed by the Judge of Probate to the person complained against, all and every gift, bargain, sale or transfer (*p*) of any real or personal estate, made by such person or persons, after the filing of the copy of said complaint and order of the Judge of Probate, with the Register of Deeds, shall be void and of no effect (*q*). And the guardian or guardians that may be thus appointed, shall, in discharging the duties of their appointment, pursue the same method, give like bond (*r*) and be under similar obligations for a faithful discharge of their trust, as guardians appointed for any idiot†, lunatic, or for persons *non compos mentis*.

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tion for guardian to Judge, to be void in certain cases.

Guardians of spendthrifts, &c. subject to like duties, &c. as guardians to idiots, &c. [† See § 46, of this ch.]

SECT. 54. *Be it further enacted*, That when a feme sole, shall be appointed by any Judge of Probate, either by herself, or jointly with any other person or persons, guardian to any person either minor, idiot, *non compos*, distracted or lunatic; and after such appointment, shall marry, such marriage\* shall not make the baron guardian in her right, but shall operate as an extinguishment or determination of such woman's power and authority.

Feme sole, appointed guardian, to lose her authority by being married.

[\*217]

SECT. 55. *Be it further enacted*, That any Judge of Probate may dismiss (*s*) any guardian of a minor, idiot, *non compos* or lunatic person, or of persons who spend their estates

Judge may dismiss guardians when necessary.

(*p*) See ante, note i, 2, to § 49, of this chapter.

(*q*) This prevision does not apply to promissory notes, given by the ward. *Smith vs. Spooner*, 3 Pick. 229.

(*r*) It is not requisite that such guardians should give a bond with sureties, as a condition precedent to their acting. *Russell & al. vs. Coffin*, 8 Pick. 143

(*s*) See note j, to § 49, p. 249, of this volume.

CH. 51. by excessive drinking, idleness or debauchery, whenever it shall appear to the said Judge, to be necessary or expedient, and to appoint some other guardian in his place : *Provided always*, That no such guardian shall be dismissed as aforesaid, before he shall have had notice in writing, from said Judge, fourteen days at least before the time of hearing, to appear and show cause why he should not be so dismissed.

[Mass. Stat.  
Feb. 24, 1818,  
§ 36.]

Guardians not  
to transfer  
stocks, &c.  
belonging to  
their wards  
without license  
from Judge of  
Probate.

[Ib. § 35.]

SECT. 56. *Be it further enacted*, That before any guardian shall transfer or draw from any loan office, bank, insurance office or other corporation, any loan office certificate, or share in such bank, insurance office or other corporation, or any stock in any public fund, belonging to the ward of such guardian, it shall be the duty of such guardian to obtain license so to do, from the Judge of Probate of the county where such guardian has been or shall be appointed ; and upon neglect thereof, such guardian shall be removed from office, and shall be considered as having forfeited his probate bond (t).

Judge may  
grant *dedimus*  
to administer  
oaths to execu-  
tor, adminis-  
trator, and  
guardians in  
certain cases.

[Ib. § 20.]

SECT. 57. *Be it further enacted*, That in any case where the oath of an executor, administrator or guardian, is or may be required by law to be made personally before the Judge of Probate, to an inventory, or to any account which is to be settled by such Judge, and such executor, administrator or guardian, shall be unable by reason of sickness, bodily infirmity or otherwise, to attend before such Judge, it shall be lawful for such Judge by commission of *dedimus potestatem*, to authorise any disinterested Justice of the Peace to administer such oath, a certificate whereof shall be returned to such Judge, together with such commission and inventory or account and the vouchers to prove the same (u).

Trustees of  
estates of mi-  
nor and oth-  
ers, appointed

SECT. 58. *Be it further enacted*, That all persons who are or may be constituted trustees of any estate, real, personal or mixed, belonging to minors or other persons, to

(t) Previous to the enactment of the statute of Feb. 24, 1816, § 35, a guardian of a person *non compos* had general authority to sell any personal property of his ward, and though he might improperly make a sale, a *bona fide* purchaser would have a good title. *Ellis vs. E. M. Bridge*, 2 Pick. 243.

(u) See note h, to § 7, p. 221, of this volume.

whom such\* estate has been or may be devised, in trust for such minors or other person, by the last will and testament of any person, shall, except in the cases hereinafter mentioned, give bond to the Judge of Probate of the county in which such last will and testament has been or shall be proved, approved and allowed, with sufficient surety or sureties within the State, in such sum as the said Judge shall order, conditioned for the faithful execution of such trust according to the true intent and meaning of the testator; and that the trustee shall make a true and perfect inventory of the real estate, goods and chattels, rights and credits of such minors or others, to be returned, filed and recorded in the Probate office of such county at such time as the said Judge shall order, and that the said trustee will annually render an account to the said Judge of the annual income and profits thereof; and at the expiration of such trust will adjust and settle his accounts with the said Judge, and will pay and deliver over all balances and sums of money or other property that may be due, and give possession of the other estate belonging to such minors or others with which such trustees may have been entrusted: *Provided nevertheless*, That no trustee, so long as he shall continue faithfully to execute the trust, shall be obliged to give bond as aforesaid, in any case in which the testator in his last will shall have directed or requested, that such bond should not be given, nor in any case, in which all the cestui que trusts being of full age, and legal capacity, shall signify to the Judge of Probate his or her request, that such bond should not be taken: *And provided also*, That no person appointed a trustee before the passing of this act, and having entered upon the execution of the trust without having given bond as aforesaid, shall be obliged to give such bond, or be subject to any of the requirements of this act, unless after being cited to appear before the said Judge upon complaint in writing, it shall appear to the said Judge upon a full hearing, that it is necessary that such bond should be given in order to secure the faithful execution of such trust: *And provided also*, That such bond shall not be required of any such trustee who entered upon the execution of his trust before the passing of

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by will, to give  
bond to Judge.  
[\*218]

[Ib. § 37.]

Condition of  
such bond.

Provisions as  
to cases in  
which bonds  
shall not be  
required.

CH. 51. an act, entitled, "An Act requiring the trustees of the prop-  
erty\* of minors and others to give bond in certain cases,"  
made and passed on the twenty-fifth day of February in the  
year of our Lord one thousand eight hundred and eleven, and  
who has continued and shall continue faithfully to execute his  
trust : *And provided also*, That nothing in this or in either  
of the following sections shall be construed to take away any  
of the powers which are now by law vested in the Supreme  
Judicial Court.

Trustees re-  
fusing to give  
bond, how to  
be proceeded  
with.

[Ib. § 38.]

SECT. 59. *Be it further enacted*, That any person who  
has been, or shall be constituted a trustee as aforesaid, and  
who shall neglect or refuse to give bond as aforesaid, shall be  
considered as having declined the acceptance of such trust ;  
and the trustee or trustees who may be appointed by the  
Judge of Probate as is hereinafter provided, shall and may  
thereupon be authorized to demand and receive of the trust-  
tees originally appointed as aforesaid, all such estate as may  
have come to their hands by virtue of such trust, and to man-  
age, pay and deliver over such property to said minors and  
others, in the same manner and under the same restrictions,  
obligations and duties as guardians are now by law obliged  
to do.

Trustees in  
certain cases  
may resign.

[Ib. § 39.]

SECT. 60. *Be it further enacted*, That any trustee ap-  
pointed either by the testator as aforesaid, or by the Judge of  
Probate, shall upon request in writing to the said Judge be  
permitted to resign the trust, first accounting for, and paying  
and delivering over such estate as shall have come to his  
hands by virtue of such trust, to such other person as the  
said Judge shall appoint a trustee in his stead : *Provided al-  
ways*, That no such resignation except in the case of an ex-  
ecutor or administrator who shall succeed to such trust upon  
the decease of his testator or intestate, shall be accepted and  
allowed, unless it shall clearly appear to the said Judge to  
be expedient and proper.

In certain ca-  
ses of vacancy  
of one or more  
trustees by  
death or other-  
wise, Judge to  
appoint others  
in their places.

SECT. 61. *Be it further enacted*, That in case any per-  
son who has been, or shall be appointed a sole trustee ; or  
any two or more persons, who have been or shall be appoint-  
ed joint trustees in any last will, no provision being therein  
made for perpetuating such trust, and such sole trustee or any

one or more of such joint trustees shall decline the acceptance of the trust, or shall die either before or after having accepted the\* trust, or shall neglect or refuse to comply with the provisions of this act ; the respective Judges of Probate shall, after notice to the cestui que trusts, appoint one or more suitable persons to be trustee or trustees in the place of the trustee or trustees, so dying or declining to accept as aforesaid ; and any trustee or trustees appointed by the Judge of Probate shall be holden and bound by the provisions of this act, in the same manner as if he or they had been so appointed in and by such last will ; and the estate, so given in trust by such last will shall vest in the trustee or trustees so appointed by the said Judges of Probate, in like manner to all intents and purposes as the same vested in the original trustee or trustees under such last will.

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[\*230]

[1b. § 40.]

SECT. 62. *Be it further enacted*, That when any trustee, appointed either by any testator or by any Judge of Probate, shall, in the opinion of the Judge of Probate, be disqualified for the discharge of the trust, by becoming *non compos mentis* or otherwise incapable or evidently unsuitable for the execution of such trust, it shall be lawful for the said Judge, after notice to such trustee, and the parties interested in the trust estate to remove such trustee, and to appoint and substitute another in his stead. And whenever any person shall be appointed and substituted as a trustee by the Judge of Probate as aforesaid in the place of any former trustee, who may either have been removed from office or have deceased, or have declined or resigned the trust as aforesaid, the person so appointed and substituted by the said Judge, shall give bond with sufficient surety or sureties, and shall be held to perform all the duties prescribed in the fifty-eighth section of this act : *Provided however*, That it shall be in the discretion of the said Judge to direct an inventory to be made and returned or not, by such new trustee, who in no manner whatever shall be deemed a trustee, or authorized to act as such, until such bond shall be given.

Judge may remove trustees, whenever disqualified, or unsuitable, and appoint others.

[1b. § 41.]

Trustees so substituted to give bond, &c.

SECT. 63. *Be it further enacted*, That whenever the sureties in any bond given to the Judge of Probate, shall be evidently insufficient for the purposes of such bond, the

Judge to require new bonds, when sureties are insufficient, on



**CH. 51.** Judge of Probate, on the petition of any person interested, and after due notice to the principal and sureties on such bond, shall have authority to require from time to time new bonds\* with sufficient surety or sureties in the case; and whenever any surety or sureties on any bond given to the Judge of Probate, shall, at any time after six years from the date of such bond, petition the Judge of Probate, that he or they may be discharged from any further responsibility upon such bond, the said Judge after due notice to all persons interested, may in their discretion discharge such surety or sureties from all further responsibility on such bond, and the said principal or principals shall in all such cases be required to procure other sufficient surety or sureties upon such bond, or upon a new bond to be given to the Judge of Probate for the purpose. And if such principal or principals shall not within such time as shall be ordered by said Judge, give such new bonds as may be required by virtue hereof; he, she or they shall be removed from their trust, and some other person or persons shall be appointed in his, her or their stead.

application of persons interested—after giving notice: [\*221]

and may require new sureties, if sureties apply, &c.; [Ib. § 42.]

and remove from their trust such as do not comply with such order.

Appeal allowed from all decrees, &c. of Judge,

if claimed within one month.

[Ib. & Mass. Stat. Mar. 12, 1784, § 4.]

**SECT. 64.** *Be it further enacted,* That any person aggrieved at any order, sentence, decree, or denial of any Judge of Probate in any county, may appeal (v) therefrom to the said Supreme Court of Probate: *Provided,* Such appeal be claimed within one month (w) from the time of making such order, sentence, decree or denial, and bond be given and filed in the Probate office by the appellant, within ten days after such appeal shall be claimed and granted, for the prosecution thereof to effect, at the next Supreme Court of Probate, and for paying all intervening costs and damages, and such costs as

(v) 1. On an appeal from a decree of the Judge of Probate against the application of one, who had been put under guardianship as *non compos*, to have the letters of guardianship revoked, the appellant need not give bonds to prosecute the appeal. *McDonald vs. Morton & al.* 1 Mass. 543.

2. Upon an appeal from a decree of the probate court approving a will, the will is to be proved in this court as if the question had originated here; and the appellee, having the affirmative, is to open and close. *Buckminster & al. vs. Perry*, 4 Mass. 593.

(w) A calendar month is meant. *Avery & al. vs. Pixley, ex ec.* 4 Mass. 460.

the said Supreme Court of Probate shall tax against him. **CH. 51.**

And such appeal shall be taken notice of, and proceeded upon at the next term of the Supreme Judicial Court, which shall be holden next after the expiration of thirty-four days after such appeal shall be made, within and for the county where such order, sentence, decree or denial was made; and the appellant shall file the reasons of appeal, in the Probate Court appealed from, within ten days after the bond is given, and shall serve the adverse party or parties with an attested copy of such reasons, fourteen days at least before the sitting (x) of the said Supreme Court of Probate, at which the trial is to be had. And when it shall appear from the reasons of appeal, that the sanity of the testator, or the attestation\* of the witnesses in his presence (y), as the law directs, is the question in controversy, on any will or codicil, the said Supreme Court of Probate may for the determination thereof, direct a real or a feigned issue to be tried before a Jury in the same Court at the expense of the appellant, in case the issue be found against him. And in case the party or parties appealing fail in the prosecution of the said appeal to effect, then the adverse party or any person interested in the sentence or decree so appealed from, shall have the benefit of the same, by filing a complaint before the Supreme Court of Probate in like manner as is provided by law for affirming the judgment of the Circuit Court of Common Pleas, in the Supreme Judicial Court; and the Supreme Court of Probate may assess reasonable costs (z), in all cases that may be brought

When and how such appeals are to be prosecuted; and mode of trial, &c.

[\*222]

Costs, how assessed; execution, &c.

(x) "Before the sitting," means before the first day of the term. *Anonymous*, 5 Mass. 197.

(y) The signing of the testator, as well as that of the witnesses, is included in the issue joined in such case. *Amory vs. Fellowes*, 5 Mass. 219.

(z) 1. A complaint should be filed in order to secure costs in such cases. *How vs. How*, 5 Mass. 375.

2. The statute gives this court discretionary power as to costs, in these cases; and as none are ever allowed before Judges of Probate, we do not generally award any, unless when the appeal is on frivolous pretences or for reasons which the appellant knew, or ought to have known, to be unfounded. Ordinary legal costs are intended. *Osgood vs. Breed*, 12 Mass. 536.

3. *Swan, app. vs. Picquet*, 4 Pick. 465.

**CH. 51.** before them, by way of appeal, from the respective Judges of Probate, and grant execution therefor : *Provided always*, that any person beyond sea, or out of the United States, who shall have no sufficient attorney within the State at the time of such order, sentence, decree or denial, shall have one month after his or her return, or constitution of such attorney to claim and prosecute an appeal as aforesaid.

Proviso in favour of persons beyond sea, &c. as to privilege of appeal.

Sup. Court to grant appeal in certain cases on petition, after right of appeal is lost.

[Mass. Stat. Feb. 24, 1818, § 8.]

Limitation to one year for petition.

**SECT. 65.** *Be it further enacted*, That whenever any person has been, or shall be aggrieved by any order, sentence, decree, denial or decision (a) of any Judge of Probate in any county, and such person by accident, mistake or otherwise shall not have appealed to the Supreme Court of Probate agreeably to the provisions of law, the said Supreme Court of Probate upon petition to them, and after notice to the person or persons interested to support such order, sentence, decree, denial or decision, and upon its appearing that the petitioner has not lost his appeal by his own neglect, and that justice requires a revision of such order, sentence, decree, denial or decision, may grant an appeal therefrom, to be entered, heard and determined in the said Supreme Court of Probate : *Provided always*, That such petition shall be preferred within one year next after such order, sentence, decree, denial or decision shall have been made by such Judge of Probate.

[\*223]

Proceedings before Judge to be staid on appeal claimed, reasons of appeal and bond filed, &c.

[Mass. Stat. Mar. 12, 1784, § 5, and Feb. 24, 1818, § 9.]

**SECT. 66\*.** *Be it further enacted*, That whenever there shall be an appeal from any order or decree of any Judge of Probate of any county to the Supreme Court of Probate as aforesaid, and the appellant shall file in the Probate office, his reasons of appeal, and give bonds (b) to prosecute the same to effect according to law, and shall give notice thereof to the adverse party ; in such case, all further proceedings, in consequence of such order, sentence, decree, denial or

(a) 1. Walker, app. vs. Lyman, 6 Pick. 458.

2. Swan app. vs. Picquet, 3 Pick. 443.

(b) On an appeal from a decree of the Judge of Probate against the application of one who had been under guardianship as *non compos*, to have the letters of guardianship revoked, the appellant need not give bonds to prosecute the appeal. *McDonald app. vs. Morton & al.* 1 Mass. 543.

decision, shall be staid until a final determination shall be had thereon in the said Supreme Court of Probate. CH. 51.

SECT. 67. *Be it further enacted*, That any† person aggrieved by any order, sentence, decree or denial of any Judge of Probate, upon any matter touching such trust as aforesaid, may appeal therefrom, as in any other case of an order, sentence, decree or denial of a Judge of Probate. And the Supreme Court of Probate and the Judges of Probate, respectively, may in their discretion award reasonable costs (c) to either or both parties, in all those cases where justice shall require it, and shall grant execution therefor.

[†See note 1, ante p. 250.]

Appeal allowed, relating to trusts.

[Mass. Stat. Feb. 24, 1818, § 44.]

Power of Supreme Court as to costs in such cases.

SECT. 68. *Be it further enacted*, That the Judges of Probate of the respective counties shall have the same authority which the Courts of Common Law have upon petition to empower and license executors, administrators and guardians of minors or others, to sell (d) the real estate of their testators, intestates and wards, respectively, for the payment of just debts and legacies, with incidental charges, and charges of administration; and such authority to sell shall extend as well to any real estate which is or may have been held by such testator or intestate in mortgage, and of which such executor or administrator shall have recovered seizin and possession, or which shall have been set off on execution to such executor or administrator for the use of the widow, heirs or devisees of such testator or intestate, as to the other real estate of such testator or intestate; first giving notice (e)

Judge of Probate may license executors, administrators and guardians to sell real estate for payment of debts, legacies and charges:

[Ib. § 10.]

giving notice.

(c) See ante, note x, to § 64, of this chapter.

(d) 1. See ante, note n, § 4, p. 251 of this volume.

2. Heirs at law, creditors and others interested in an estate sold by executors &c. under a license from court, are not concluded by such sale, unless every essential requisite and direction of law respecting the same has been faithfully complied with; except after long acquaintance. But strangers, having no privity of estate or interest affected by such sale, cannot question the proceedings of an executor, &c. otherwise duly authorized, and whose deed, made or recited to be made, upon a sale pursuant to such authority, is produced. *Knox & al. vs. Jenks*, 7 Mass. 488.

(e) And bond; ch. 470, § 6, vol. 8, p. 315, provides for it, as follows:

“That executors, administrators and guardians shall in all cases of license obtained to sell real estate prior to making such sale, give bond with sufficient sureties to the Judge of Probate for the County, having jurisdiction of

CH. 51. to all persons interested as by law required in case of petition for such licenses to said Courts of Common Law : *Provided*, That an appeal shall be allowed from any order, sentence, decree, denial or decision of any Judge of Probate, respecting any petition for such license in like manner as in other cases.

Appeal allowed on order for sale, &c.

[\*224] SECT. 69\*. *Be it further enacted*, That every executor, administrator, guardian or other person, who shall have or obtain a license from any Court according to law, for selling real estate of any person deceased, or under guardianship, shall, previous to fixing upon the time and place of the sale of such estate, take the following oath (f) or affirmation before the Judge of Probate, or before some Justice of the Peace ; whose certificate thereof shall be returned to the Judge of Probate, to wit :

Persons licensed to sell real estate in such cases—to make oath ;

[Ib. § 11.]

form of their oath.

“ I A. B, do solemnly swear, (or affirm as the case may be) that in disposing of the estate lately belonging to , now deceased, (or under guardianship as the case may be) I will use my best skill and judgment in fixing on the time and place of sale ; and that I will exert my utmost endeavors to dispose of the same in such manner as will produce the greatest advantage to all persons interested therein ; and that without any sinister views whatever.”

Suits on bonds to Judge of

SECT. 70. *Be it further enacted*, That all suits brought in the name of any Judge of Probate upon a probate bond (g)

the settlement of such estate, that they will observe all the provisions of law for the sale of real estate by executors, administrators and guardians, and that the proceeds of the sale shall be truly applied and accounted for according to law.”

(f) Parker vs. Nichols, 7 Pick. 111.

(g) 1. If in an action on a probate bond, the writ, besides the usual indorsement of the attorney's name, be also indorsed with the name of the person who is entitled in any capacity to receive the money sued for, it is sufficient, though the party have only an equitable interest in the subject of the suit. *Potter, Judge, vs. Mayo & als. 2 Glf. 239.*

2. In such action, it is sufficient if the writ be indorsed with the names of the persons for whose benefit it is brought, without mentioning the characters in which they claim. *Potter, Judge, vs. Titcomb, 7 Glf. 302.*

This point ruled otherwise in *Paddleford vs. Hall & al. 2 Mass. 149.*

3. An action in the name of a Judge of Probate on an administration bond cannot be referred. *Thomas vs. Leach & al. 2 Mass. 152 ; Paine vs. Ball & al. 3 Mass. 236.*

4. No action can be sustained upon an administration bond, (except by a creditor having his debt ascertained by a judgment or decree of distribution,

of any kind shall be originally commenced in the Supreme (h) CH. 51.  
 Judicial Court held within or for the county in which the Probate, how  
 said Judge of Probate shall belong. And the writ in addition brought.  
 to the usual endorsement of the name of the plaintiff or his  
 attorney, shall also have the name of the person or persons, [Mass. Stat.  
 for whose particular use and benefit the suit is brought writ- Feb. 15, 1787,  
 ten thereon (i). § 3.]

SECT. 71. *Be it further enacted*, That when any suit In suits on such  
 shall be brought on a probate bond, and the principal named bonds, when  
 in the bond is living and resident within this State, and shall principal is out  
 not be named in the writ, or if named, shall not be attached of State and  
 or summoned to answer thereunto, it shall and may be law- not served with  
 ful for the Court, at the request of the surety or sureties that the process,  
 may be attached or summoned thereby, to continue the Court may  
 same cause to the next term, or to some distant day in the continue the  
 same term, if, upon a consideration of the circumstances at- suit, &c.  
 tending the suit, they shall determine such continuance reas- [Mass. Stat.  
 onable or expedient; to the end such surety or sureties may June 20, 1788,  
 purchase out a writ in such form as the same Court shall di- § 2.]

or an heir having the *quantum* belonging to him ascertained) without an assignment or license by the Judge of Probate. *Robbins, Judge, vs. Hayward*, 16 Mass. 524; see below, note i.

5. If the action cannot be sustained for the individual benefit of the creditor instituting it, judgment cannot be rendered in favor of the Judge of Probate in his own right for the benefit of all parties interested in the estate. *Paine, Judge, vs. Stone & al.* 10 Pick. 75.

(h) *White, Judge, vs. Quarles*, 14 Mass. 451.

(i) 1. It is further provided by ch. 470, § 1, vol. 3, p. 312, as follows:

"That any person or persons interested in a probate bond, or in a judgment that may have been rendered on such bond, shall have a right to institute a suit thereon without applying to the Judge of Probate, to whom given or in favor of whom rendered, or his successor. And instead of endorsing on the writ for whose benefit the suit is brought, as is now provided, he or they instituting such suit, shall allege in the writ, his or their own name, place of abode and addition, and that the same is sued out by him or them in the name of ———, Judge of Probate for the County of ———. And in case such suit is not sustained, the Court, before whom the same is pending, shall render judgment and issue execution for costs against such person or persons so instituting such suit; but no judgment shall be rendered against the Judge of Probate, whose name is made use of in the writ. And where the name, place of abode and addition of the plaintiff in interest, is not set forth in the writ as aforesaid, the same shall abate."

2. *Paine, Judge, vs. Gill & al.* 2 Mass. 136.

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[\*225]

Judgment how  
to be rendered.

Preliminary  
proceedings  
when suit is to  
be instituted on  
Probate bond  
for benefit of  
creditor;

[Mass. Stat.  
Feb. 15, 1787,  
§ 2.]

—when for  
creditor a-  
gainst insol-  
vent estate;

—when for  
heir for his  
distributive  
share.

rect, for attaching the property, securing the person or summoning the principal to come in and become a party to the suit\*; and in case the principal (after being attached or summoned upon such process fourteen days or more, prior to the time of his being directed to appear and answer) shall not appear and answer, the Court are hereby authorized and empowered to render judgment against him in the same way and manner they might have done, had such principal been duly named and legally summoned by the original writ which commenced the suit, and he had neglected to appear, or appearing had neglected to make answer thereto.

SECT. 72. *Be it further enacted*, That when the suit is instituted at the desire of a creditor of the deceased, such creditor must first (j) have his debt or damages ascertained by judgment of Court, and likewise make it appear that a demand has been made of the administrator therefor; and that the administrator has refused or neglected to satisfy the same; or to show goods or estate of the deceased for that purpose. When the estate is insolvent, the creditor must produce a copy of the order of distribution of the estate of the deceased among the creditors, particularly specifying each creditor's claim, and the dividends they are severally entitled unto; and that a demand has been made of the administrator for his particular dividend, or the copy of a judgment recovered against the executor or administrator pursuant to the provision contained in the twenty-eighth section of this act. When an heir has the suit brought for his part of the personal estate, he must exhibit a copy of the decree of the Probate Court, ascertaining its quantum; and that he has made a demand thereof upon the administrator. And when the administrator shall refuse or neglect (k) to account upon oath for such prop-

(j) See ante, note g, 4, to § 70, of this chapter. *Dawes, Judge, vs. Head & al.* 3 Pick. 128.

(k) 1. No administrator is to be considered as refusing or neglecting to account under oath, for such property of the intestate as he has received, within the meaning of the statute of Feb. 15, 1787, until he has been cited by the Probate Court for that purpose. *Nelson, Judge, vs. Jaques & al.* 1 Glf. 139.

2. A citation from the Judge of Probate requiring him to render his ac-

erty of the intestate as he has received, after he has been cited by the Judge of Probate for that purpose, execution shall be awarded against him for the full value of the personal property of the deceased that has come to his hands, without any discount, abatement or allowance for charges and expenses of administration or debts paid. And in cases where any administrators shall have received the personal property of an intestate, and shall not have exhibited upon oath a particular inventory thereof, execution shall be awarded against him for such a part of the penalty of his administration bond, as the Supreme Court of Probate shall\*, on full consideration of all the circumstances of the case, judge reasonable; to be distributed among the parties interested, agreeably to the directions of law. The like judgment and proceedings (so far as they can with propriety take place) are to be had upon bonds of executors (1), guardians and others, given to the Judges of Probate Courts in their said capacity.

SECT. 73. *Be it further enacted*, That when it shall appear upon a hearing in chancery on an administration bond, for whose particular use and benefit the money for which execution issues is to enure, the judgment shall be rendered, that the plaintiff in his said capacity (naming him) now have execution for — being part of the penalty forfeited and costs

## CH. 51.

Execution how to be awarded against administrator refusing to account for property of intestate.

—how to be awarded when administrator has received property not inventoried.

[Mass. Stat. Dec. 13, 1816, § 2.]

[\*226]

—recovery how to be distributed.

Judgment and proceedings upon bonds in other cases.

Manner and form of judgments on administration bonds.

[Mass. Stat. Feb. 15, 1787, § 1.]

count, is a necessary preliminary in order to charge the guardian on his bond. *Bailey vs. Rogers & al.* 1 *Glf.* 195.

3. The principle is the same, in relation to administrators. *Potter, Judge, vs. Titcomb*, 7 *Glf.* 303.


4. *Higbee & al. vs. Bacon*, adm. 8 *Pick.* 484.

5. See ante, note i, to § 49, p. 249, of this volume; also, note p, to § 15, p. 226, of this volume.

(1) 1. Although a legatee may sue for his legacy at common law, [see ante, § 43, p. 246, of this volume] yet this must be after it is made to appear by a settlement in the probate office, that there are assets for the purpose. *Richards adm. vs. Dutch & al.* 8 *Mass.* 512; *Andrews, ex. vs. Hunneman & al.* 6 *Pick.* 129.

2. No action lies on a bond, given by an executor for the faithful execution of his trust, for the benefit of a legatee to whom a personal legacy is bequeathed and payable at a certain day, until after a demand of the legacy, by the legatee upon the executor. *Prescott, Judge, vs. Parker & als.* 14 *Mass.* 429.



**CH. 51.**  taxed at ——— for the use of A. B. of C. in the county of S. (addition) a creditor or heir of E. F. deceased (as the case may be.) And the person to whose use judgment shall be rendered in the name of the Judge of Probate as aforesaid, may sue out execution thereon, and have the same levied on personal or real estate, as he may find it necessary, and shall be deemed and taken to be the creditor, to every intent and purpose whatever. And when there are several persons to whose use the monies recovered on an administration bond are to enure, there shall be as many separate and distinct judgments, in form aforesaid (m).

Proceedings in suits on bonds of trustees.

[Mass. Stat. Feb. 24, 1918, § 48.]

Penalty for refusing to appear at Probate Courts after being cited.

[Mass. Stat. Mar. 4, 1794, § 13.]

**SECT. 74.** *Be it further enacted,* That any bonds given pursuant to this act, by any trustee, or trustees, may be put in suit by order of the Judge of Probate to whom the same shall have been given, for the benefit either of all or any of the minors or other persons interested in the estate given in trust as aforesaid; and the proceedings in such case shall be the same as in the cases of suits on other Probate bonds.

**SECT. 75.** *Be it further enacted,* That when any person shall be cited to appear as a witness before the Judge of Probate in any cause or hearing, and such person shall refuse to appear or give evidence, he or she shall be liable to the like penalty or damage as such person would be liable unto for refusing to appear or give evidence in any Circuit Court of Common Pleas. [Approved March 20, 1821.]

Additional Act, ch. 198, Vol. 3, p. 21.

(m) 1. This section relates undoubtedly to bonds given by executors, no less than to those of administrators. And after the judge of probate has obtained judgment for a breach of the condition, the court may award execution to any one who shall satisfactorily prove that he was entitled to an indemnity out of the penalty of the bond. *Paine, Judge, vs. Gill & al.* 13 Mass. 369.

2. For form of judgment in such case, see *Paine vs. McIntire*, 1 Mass. 69.

3. Judgment in a suit on an administration bond is rendered for interest from the time the Judge of Probate passed his decree. *Ib.*; see *Saxton vs. Chamberlain*, 6 Pick. 422.

## Chapter 52.\*

## CH. 52.

AN ACT respecting Executors, Administrators, and Guardians, and the conveyance of Real Estate in certain cases.

[\*227]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That all the lands, tenements and hereditaments(a) of which any person may die seized, in fee simple, or in fee tail general or special, and also all such estate which he had fraudulently conveyed, or of which he had been colourably or fraudulently disseized with intent to defraud his creditors, shall be liable for the payment of his debts, and may be recovered (b) and applied thereto in the manner by law directed.

What real estate of persons deceased shall be liable for payment of their debts.

[Mass. Stat. Mar. 12, 1806.]

SECT. 2. *Be it further enacted*, That when the goods and chattels belonging to the estate of any person deceased, shall not be sufficient to answer his just debts and legacies(c), upon representation thereof, and the same being made to ap-

When personal estate is insufficient to pay debts, &c. license to sell real estate may

(a) Hereditaments include whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed property. *Whitney vs. Whitney*, 14 Mass. 92.

(b) 1. An administrator as such, cannot maintain a real action to recover possession of the real estate of his intestate, except such as was mortgaged to the intestate. *Drinkwater vs. Drinkwater Adm.* 4 Mass. 354; *Willard vs. Nason*, 5 Mass. 241.

2. Nor can an administrator defend in a real action brought against him as such, by one claiming as a purchaser from the intestate, whether the purchase was *bona fide* or fraudulent as to creditors. *Ib.*


3. Heirs may enter immediately into the possession of the lands of the deceased, subject to the right of his creditors upon such lands; and are entitled to the rents and profits, until a sale by the executor or administrator under license. *Gibson & al. vs. Farley & al.* 16 Mass. 236.

4. It is the same if the lands be mortgaged, until the entry of the mortgagee. *Ib.*

5. The lands of an intestate are not assets to be administered upon, except when there is a deficiency of personal estate to pay the debts of the intestate, owed at the time of his decease. *Dean vs. Dean*, 3 Mass. 261.

6. The administrator in such case cannot administer on the lands but by selling them under a license therefor, and by appropriating the proceeds to the discharge of the intestate's debts. *Ib.*

(c) The lands of deceased testators are not chargeable with legacies bequeathed in any last will, unless such will be executed in the manner prescribed for devising real estate. *Winslow & al. Exs. Apps.* 14 Mass. 422.

**CH. 52.**  appear to the Supreme Judicial Court in any county in this State, or to the Circuit Court of Common Pleas, in the county where the deceased person last dwelt, or in the county in which the said real estate lies, the said Courts are severally and respectively authorized to empower and license (d) the executor, or administrator of such estate, to sell (e) all or such part of the houses, lands or tenements of the deceased,

be granted by  
Sup. J. Court,  
or C. C. Com.  
Pleas.

[Mass. Stat.  
Mar. 4, 1784,  
§ 1.]

(d) 1. This Court has a discretionary power, to grant or refuse a license to executors and administrators, to sell the real estates of their testators or intestates, notwithstanding the certificate of the Judge of Probate [see above § 4] of the deficiency of personal estate. *Pet. of Jas. Allen*, 15 Mass. 58 ; See *Scott. Petr. vs. Hancock & als.* 13 Mass. 162.

2. *Fay vs. Valentine & al.* 8 Pick. 526. But see note c to § 68, of last chapter, p. 261.

(e) 1. It is provided further by ch. 342, vol. 3, p. 187, as follows :—

“That in all cases where the Supreme Judicial Court is now authorized to license and empower Executors, Administrators, Guardians or other persons, to make sale of Real Estate at public auction, they may hereafter authorize and empower them to make sales, from time to time, at private sale, if it shall satisfactorily appear to said Court, that the interest of all concerned requires a private sale. And where said lands are situated in different Counties, said Court sitting in either of said Counties, may authorize the sale of the whole, or any part of said land, situated in any other County or Counties, either at public or private sale, as they may think proper.

See also § 4 of ch. 470, copied in note n, 3, on p. 251 of this volume.

2. The right of an administrator to sell is a naked power, which cannot be defeated by alienation or disseizin. *Willard vs. Nason*, 5 Mass. 242.

3. Land in the possession of a fraudulent purchaser, may be sold by the administrator, and the purchaser at such sale may enter, and maintain a real action on his own seizin. *Ib.*

4. But lands of a deceased person are not liable for the payment of his debts, unless he died seized of them, or had fraudulently conveyed them, or was colorably and fraudulently disseized of them, with intent to defraud creditors. *Ib.* 244.

5. The Court may direct the sale of any specific part of the estate. *Hays & al. vs. Jackson & als.* 6 Mass. 149.

6. A title under a sale by administrators, by virtue of a license from the Court of Common Pleas, was holden good against the heirs of the intestate, although the license was improvidently granted. *Perkins vs. Fairfield*, 11 Mass. 227; See *Thompson vs. Brown & al.* 16 Mass. 172, & *Thompson vs. Emerson*, *ib.* 429; also, ante note d, 2, p. 261.

7. The statute of Mar. 4, 1784, § 1, gives no authority to appoint a stranger to execute that duty ; and a sale by a stranger so licensed conveys no title to the purchaser. *Crouch & ux. vs. Eveleth*, 12 Mass. 503.

as may be necessary to satisfy his just debts and legacies, with incidental charges and charges of administration. And every executor or administrator being so licensed and authorized as aforesaid may make and execute in due form of law, deeds (*f*) and conveyances of such houses, lands and tenements, as they shall so sell, and such deeds and conveyances shall make as good a title to the purchaser, his heirs and assigns forever, as the testator or intestate had therein. And the executor or administrator previous to such sale, shall give thirty days' notice thereof by posting notifications in some public place in the town or plantation where the real estate lies, in two adjoining towns, and in the town where the testator or intestate last dwelt; or by causing an advertisement (*g*) thereof to be published three weeks (*h*) successively, in such newspaper as the Court, who may authorize the sale, shall order\* and direct: *Provided always*, That no such license shall be granted by either of the Courts aforesaid, until after personal notice or notice† given by an advertisement for three weeks successively, in such newspaper as the Court shall order, to all persons, interested therein, of the time and place, at which they may be heard concerning the same: and if the said persons interested, or any of them shall give bond with sufficient sureties to pay such debts and legacies, with incidental charges, then such license shall not be granted.

CH. 52.

Executor or administrator being licensed may execute deeds;

must give 30 days notice previous to sale.

[\*228]

Courts to order notice previous to granting license. [†Rulluff's case, 1 Mass. 240.]

[Mass. Stat. Feb. 24, 1818, § 10.]

(*f*) 1. *Sumner, adm. vs. Williams & al.* 8 Mass. 162; *Pond vs. Wetherbee*, 4 Pick. 312.

2. It is the duty of the seller in such case to make and tender a deed within a reasonable time. And the purchaser is justified in delaying to complete the contract till he has had a reasonable time to take legal advice respecting the formality and validity of the deed tendered. *Cleaves vs. Foss*, 4 Glf. 1.

(*g*) An administrator is not bound to state the conditions of sale, in his advertisement. *Paine, Judge, vs. Fox*, 16 Mass. 129.

(*h*) 1. The notice will be good, though neither of the advertisements was published thirty days previous to the sale. *Frothingham vs. March*, 1 Mass. 247.

2. But when the sale was advertised to be on Friday the 17th, whereas Friday was the 16th, the sale was void for that cause. *Wellman vs. Laurence*, 15 Mass. 326.

## CH. 52.

SECT. 3. *Be it further enacted, That whenever it shall*

If partial sale of estate, for payment of debts, &c. would greatly injure the rest, Courts may authorize a sale of the whole by executors, administrators, guardians, &c.

[Mass. Stat. Mar. 4. 1784, § 2.]

Notice to be given.

Bond to the Judge of Probate to account, &c.

[\*229]

be necessary that executors or administrators, shall be empowered to sell some part of the real estate of testators or intestates, or for guardians to sell some part of the real estate of minors or persons *non compos mentis* (i), for the payment of just debts, legacies or taxes, or for the support or legal expenses of minors or persons *non compos mentis*, and by such partial sale, the residue of such real estate would be greatly injured and the same shall be represented and made to appear to the Justices of either of the aforesaid Courts on petition, and declaration filed, and duly proved therein, by the said executors, administrators or guardians, the Justices of the aforesaid Courts respectively, may authorize and empower such executors, administrators or guardians, to sell and convey the whole, or so much of such real estate, as shall be most for the interest and benefit of the parties concerned therein, at public auction, and good and sufficient deed or deeds of conveyance thereof to make and execute; which deed or deeds, when duly acknowledged and recorded in the Registry of Deeds for the county where the said real estate lies, shall make a complete and legal title in fee to the purchaser or purchasers thereof: *Provided*, The said executors, administrators or guardians give public notice of such intended sale in manner and form herein before prescribed: *And provided also*, They first give bonds (j), with sufficient sureties, to the Judge of Probate for the county where the testator or intestate last dwelt, and his estate was inventoried, that he or she will observe the rules and directions of law for the sale of real estate by executors or administrators, and that the proceeds of the said sale, after the payment of just debts, legacies, taxes, and just debts for the support of minors, and other\* legal expenses and incidental charges, shall be put on interest (k) on good security, and that the same shall be disposed of agreeable to the rules of law.

(i) See note n, 3 and 4, on p. 251, and h, 2, p. 143, of this volume.

(j) *Fay vs. Valentine & al.* 8 Pick. 526; also note c, to § 68, p. 261, of this volume.

(k) *Baylies, Judge, vs. Chace & al.* 1 Pick. 230.

**SECT. 4.** *Be it further enacted,* That the said Justices, where they may think it expedient, may examine the said petitioner or petitioners on oath, touching the truth of facts set forth in the said petition. And every representation made as aforesaid shall be accompanied with a certificate from the Judge of Probate of the county where the deceased person's estate was inventoried, certifying the value of the real estate, and the value of the personal estate of such deceased person, and the amount of his or her just debts; and also his opinion, whether it be necessary that the whole or a part of the estate should be sold, and if part only, what part (*l*).

CH. 52.

Courts may examine petitioners for sale, &c. on oath.  
Certificate required from Probate Court.

[Ib. § 3.]

**SECT. 5.** *Be it further enacted,* That the guardian or guardians of any person or persons who shall spend or waste their estates by excessive drinking, gaming, idleness or debauchery, are hereby authorized and enjoined to pay the debts of such person or persons, and to provide for their maintenance and the support of their families out of their real estate, when their personal estate shall be insufficient, and for these purposes may sell so much of the real estate of their wards, as shall be necessary therefor, in the way and manner, and under the conditions, restrictions and limitations, under which executors and administrators are empowered to sell the estate of deceased persons; such guardians first obtaining a license therefor (*m*) from the Supreme Judicial Court, or from the Circuit Court of Common Pleas of the county where the real estate shall be, who are hereby respectively empowered to grant the same: *Provided however,* That no such license be granted, unless the person applying for the same shall produce to the Court a certificate, under the hands of the overseers of the poor of the town, in which said idle, gaming person has gained a legal settlement, giving their consent and approbation of the sale of such a proportion of the real estate of such person as such overseers shall be satisfied is necessary to discharge the *bona fide* debts of such idle person, excluding all debts contracted by gaming.

Guardians of spendthrifts, &c. may be licensed to sell real estate for payment of their debts, and support, &c.

[Mass. Stat. Feb. 23, 1807.]

Certificate of overseers to accompany petition for sale.

(*l*) See ante note *d*, 1, to § 2, of this chapter.

(*m*) And give bond; see ante note *n*, 4, to § 51, p. 251; and note *e*, to § 68, p. 261, of this volume.

## CH. 52.

If partial sale of estate, for payment of debts, &c. would greatly injure the rest, Courts may authorize a sale of the whole by executors, administrators, guardians, &c.

[Mass. Stat. Mar. 4, 1784, § 2.]

SECT. 3. *Be it further enacted, That the Justices of the Supreme Judicial Court, and they are hereby authorized, to grant license to, and authorize guardians of minors or persons non compos mentis, to sell and convey the whole or so much of just debts, legacies, or other persons, as shall be most for their expenses of maintenance, when by a partial sale thereof, the remainder of the estate would be greatly injured, in the same way and manner as they are authorized to appear to administrators, executors and guardians of persons non compos mentis, to sell real estate in the same manner: Provided however, That no such license shall be granted unless the certificate of overseers of the poor required to be produced, shall also contain their consent and approbation of such sale, and their opinion that by a partial sale of the real estate, the remainder thereof would be greatly injured.*

Stat. Mar. 4, 1784, § 2.

Bond to be given to Judge of Probate.

Certificate of Judge of Probate as to necessity of sale.

SECT. 7. *Be it further enacted, That when it shall fully appear to the Justices of the Supreme Judicial Court, aforesaid, by the petition and representation of the friends or guardians of minors interested in the real estate of any testator or intestate, that it would be for the benefit of such minors, or persons non compos mentis, that their interest therein should be disposed of, and the proceeds thereof be put out and secured to them on interest, the said Justices last mentioned, after a full examination on the oath of the petitioner or otherwise, may authorize some suitable person or persons to sell and convey such estate or part thereof, by deed or deeds duly acknowledged and recorded in the Registry of Deeds as aforesaid: Provided, Such person or persons first give bond with sufficient sureties, to the Judge of Probate for the county where the said deceased person last dwelt, to observe the rules and directions of law in the sale of real estates by executors or administrators in the second enacting clause herein prescribed, and to account for and make payment of the proceeds of the said sale, agreeable to the rules of law: Provided, That the said Judge of Probate shall certify that the whole or a part of the said estate is, in his opinion, necessary to be sold, and if part only, what part.*

## CH. 52.

[\*230]  
Sup. Court  
may authorize  
sale of whole  
of spendthrifts'  
real estate,  
when sale of  
part would in-  
jure the rest.

[Mass. Stat.  
Feb. 10, 1819,  
§ 1.]

Certificate of  
overseers of  
poor required  
in such cases.

Sup. Court  
may authorize  
sale of real es-  
tate of minors,  
in certain cas-  
es, and pro-  
ceeds to be put  
on interest.

[Mass. Stat.  
Mar. 4, 1784,  
§ 5.]

Bond to be  
given to Judge  
of Probate.

Certificate of  
Judge of Pro-  
bate as to ne-  
cessity of sale.

SECT. 6\*. *Be it further enacted*, That the Justices of the Supreme Judicial Court be, and they are hereby authorized and empowered to grant license to, and authorize guardians of persons given to excessive drinking, idleness, gaming or debauchery, to sell and convey the whole or so much of the real estate of such persons, as shall be most for their interest and benefit, when by a partial sale thereof, the remainder would be greatly injured, in the same way and manner, and under the same restrictions, as they are authorized to grant license to administrators, executors and guardians of minors and persons *non compos mentis*, to sell real estate in such cases: *Provided however*, That no such license shall be granted unless the certificate of overseers of the poor required to be produced, shall also contain their consent and approbation of such sale, and their opinion that by a partial sale of the real estate, the remainder thereof would be greatly injured.

SECT. 7. *Be it further enacted*, That when it shall fully appear to the Justices of the Supreme Judicial Court, aforesaid, by the petition and representation of the friends or guardians of minors interested in the real estate of any testator or intestate, that it would be for the benefit of such minors, or persons *non compos mentis*, that their interest therein should be disposed of, and the proceeds thereof be put out and secured to them on interest, the said Justices last mentioned, after a full examination on the oath of the petitioner or otherwise, may authorize some suitable person or persons to sell and convey such estate or part thereof, by deed or deeds duly acknowledged and recorded in the Registry of Deeds as aforesaid: *Provided*, Such person or persons first give bond with sufficient sureties, to the Judge of Probate for the county where the said deceased person last dwelt, to observe the rules and directions of law in the sale of real estates by executors or administrators in the second enacting clause herein prescribed, and to account for and make payment of the proceeds of the said sale, agreeable to the rules of law: *Provided*, That the said Judge of Probate shall certify that the whole or a part of the said estate is, in his opinion, necessary to be sold, and if part only, what part.



**SECT. 8\*.** *Be it further enacted,* That the Supreme Judicial Court, and the Circuit Court of Common Pleas be, and they are hereby authorized and empowered to grant license to, and authorize executors of the last will and testament, and administrators upon the estate of persons deceased, who reside out of this State, owning real estate within the same, at the time of their decease ; and also guardians of minors, persons *non compos mentis*, or persons given to excessive drinking, idleness, gaming or debauchery ; such minors, or other persons not living within this State, but owning real estate within the same, to sell and convey such real estate lying within this State, in the same way and manner, and under such conditions, restrictions and limitations, as are herein provided by law, for the sale of real estate by executors, administrators and guardians, within this State ; and all proceedings necessary to be had before any Judge of Probate within this State respecting such sale, shall be had before the Judge of Probate, within and for the county where such real estate may be situated.

**SECT. 9.** *Be it further enacted,* That the bond, required by law, to be given to the Judge of Probate by executors, administrators and guardians, previous to the sale of real estate, shall and may be given to the Judge of Probate for the county in which the real estate is situated, in all cases, where the deceased person to whom such estate belonged, was not an inhabitant within this State, at the time of his decease.

**SECT. 10.** *Be it further enacted,* That whenever any executor, administrator, or guardian, has been duly appointed and approved by any Judge of Probate, or any Court having Probate Jurisdiction in any other State, a certified copy of such appointment and approval, filed in any Probate office in this State, shall be sufficient evidence of such appointment and approval, and entitle such executor, administrator or guardian, to all the rights and powers incident to such appointment, as far as it respects the sale of real estate as aforesaid, which he might or could have, if he was appointed and approved as executor, administrator or guardian, by a Judge of Probate in this State.

**CH. 52.**

[\*231]  
S. J. Court  
and C. Com.  
Pleas may li-  
cense execu-  
tors, adminis-  
trators and  
guardians, to  
sell real es-  
tate lying with-  
in this State,  
of persons who  
live out, &c.

[Mass. Stat.  
Feb. 24, 1818,  
§ 1.]

Restrictions  
and limitations

Bonds on sale  
of real estate  
to be given to  
Judge of Pro-  
bate for the  
county where  
estate lies.

[Ib. § 2.]

What shall be  
evidence of ap-  
pointment of  
executor, ad-  
ministrator or  
guardian by  
Courts of Pro-  
bate out of the  
State.

[Ib. § 2.]

## CH. 52.

[\*232]

[Ib. § 13.]

SECT. 11\*. *Be it further enacted*, That any executor, administrator, guardian or other person, licensed by either of said Courts, to make sale of real estate, may adjourn such sale, if expedient, for any space of time not exceeding fourteen days.

Licenses for sale of real estate to be in force for one year, from time of granting.

Actions by persons interested to defeat such sales, limited to 5 years, excepting as to minors, &c.

[Ib. § 12.]

SECT. 12. *Be it further enacted*, That no such license as aforesaid, for the sale of real estate, granted by either of the Courts aforesaid, shall be in force for a longer term of time than one (n) year from the time when such license shall have been granted. And no action by any heir or other person, interested for the recovery of any real estate, sold under such license, shall be sustained, unless such action shall be brought within the term of five years after the execution and delivery of the deed given under such license : *Provided always*, That minors and other persons under legal disabilities, and persons out of the State, at the time of such sale, may maintain such action at any time within the term of five years from the removal of their disabilities, or from their return to the State, as the case may be. And whereas it may be often necessary to enable the representatives of persons deceased, to perform the engagements entered into by such deceased persons for the transfer of real estate :

[Mass. Stat. Mar. 4, 1784, § 3.]

S. J. Court or C. C. Pleas may authorize executors or administrators to make deeds in order to complete or carry into effect, contracts

SECT. 13. *Be it further enacted*, That whenever it shall be represented and made to appear to the Justices of either of the aforesaid Courts, in form aforesaid, by any person or persons, contracted with by bond, covenant or other contract, under seal, that a testator or intestate in his or her life time, entered into such bond, covenant or contract (o), to

(n) The deed to the purchaser must be executed and delivered within the year; otherwise it will not pass the land. *Marcy & al. vs. Raymond & al.* 9 Pick. 285.

(o) 1. The administrator of a feme covert cannot be empowered, under the provisions of § 13, to carry into effect, by executing a deed, an executory contract to convey her own lands, made during her life time, even though her husband joined with her in the obligation. *Ex parte Thomes*, 3 Glf. 50.

2. It is further provided by ch. 347, § 2, vol. 3, p. 194, as follows:—

“That the provisions of the thirteenth section of “An Act respecting executors, administrators and guardians, and the conveyance of real estate in certain cases,” be, and the same are extended to all agreements in writing, signed by the testator or intestate, to convey any real estate, which he or

convey some real estate to him or her, but was prevented by death; and that such person or persons, contracted with as aforesaid, have, on his, her, or their part, performed or stand ready to perform the conditions of such bond, covenant or contract, made with the said testator or intestate, the said Justices may, after due notice given to all concerned as aforesaid, in form aforesaid, and a full hearing had, grant license to, and empower the executors or administrators of such deceased obligor, covenantor, or contractor, to make and execute such conveyance or conveyances to such person or persons, contracted with as aforesaid, as it shall appear\* the said obligor, covenantor or contractor would by his bond, covenant or contract, be obliged to make and execute, in case he, she or they were living at the time of the performance of the conditions of the bond, covenant or contract by the contractees on their part, making reasonable allowances for any alteration, improvements or injuries, that may be made or done in the same estate since such contract was made, as the said Justices may award; which conveyance or conveyances when the instruments thereof are duly acknowledged and recorded in the Registry of Deeds for the county where such estate shall lie, shall be good and valid; and the monies or consideration paid for such estate, if not paid to the deceased contractor in his life time, shall be assets in the hands of the said executors or administrators, and be apportioned among the representatives of the deceased as other personal estate.

CH. 52.

or covenants  
made by their  
testator or in-  
testates.

[Ib. § 4.]

[\*233]

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she was prevented, by death, from completing; and whenever any real estate mentioned in the sixteenth section of said act, shall not be necessary for the payment of debts, legacies, annuities or charges of administration, the same may be divided and distributed according to the rule of distribution provided in said section, by a committee to be appointed by the Judge of Probate, having jurisdiction of the settlement of such estate, directing like proceedings to be had as in the case of the division of the real estate of any deceased person, and of which he died seized, among his, or her heirs or devisees; or said Judge of Probate having determined it to be most for the benefit of the parties in interest, may license and authorize the administrator or executor of such estate to make sale and conveyance of the same in like manner, as of such real estate for the payment of debts, legacies, annuities, or charges of administration, and shall order distribution of the proceeds thereof as personal estate among the heirs or devisees."

## CH. 52.

Costs to respondents in certain cases.

[Ib. § 6.]

Mode of perpetuating notice of sale of real estate, by executors, administrators & guardians, &c.

[Mass. Stat. Feb. 14, 1789, § 6, & June 22, 1812.]

[\*234]

Lands set off on execution to executors or administrators—or recovered on foreclosing mortgage, to be for the use of widow and

SECT. 14. *Be it further enacted*, That when it shall appear to the said Justices, on examination, that the said petition or petitions in any of the foregoing applications, are unreasonable, the said Justices may award costs to such respondents as shall appear and object thereto.

SECT. 15. *Be it further enacted*, That the affidavit of any executor, administrator, guardian or other person, who has been, or hereafter may be duly licensed to sell real estate, or of any person employed by any of them, taken within eighteen months, next following the sale of such real estate, and filed in the Probate Court, and recorded together with one of the original advertisements of the time, place and estate to be sold, or a copy of such advertisement, are hereby declared to be one (p) mode of perpetuating the evidence that such notice was given, and also to make the originals or copies thereof, from the Register of the Probate Court, admissible evidence in any Court of law. And when the person employed by the executor, administrator or guardian to post up such notifications, or cause them to be printed as aforesaid, resides more than ten miles distant from such Probate Court, his deposition respecting that matter, taken before a Justice of the Peace, and filed in such Probate Court within eighteen months as aforesaid, shall have the same force\* and effect as if the same was taken before the Probate Court.

SECT. 16. *Be it further enacted*, That wherever any executor or administrator shall recover judgment (q) for any sum of money, whereon execution shall issue, and lands, tenements, or hereditaments shall be set off to the said executor or administrator, in discharge of the said execution, the said executor or administrator shall be seized and possessed of the

(p) Gray vs. Gardner, 3 Mass. 402.

(q) 1. Where an administrator recovers judgment in that capacity, which is satisfied by an extent on land, he has a trust estate in the land, continuing till it is rendered certain, by proceedings in the Probate office, or otherwise, that it will not be necessary for the payment of debts; after which a writ of entry may be maintained by the heirs at law, counting on their own seizin. *Webber & al. vs. Webber*, 6 Glf. 127.

2. See note o, 2, to § 13, of this chapter.

whole estate in the lands, tenements or hereditaments so set off to the sole use and behoof of the widow and heirs (r) of the deceased intestate, or to the residuary legatee or legatees of the testator, as the case may be; and the Court of Probate may make distribution of the same, as well as of lands and tenements mortgaged to testators or intestates, of which seizin and possession shall have been recovered by executors or administrators as of personal estate, accordingly; unless the lands, tenements or hereditaments so set off on the said execution, or of which seizin and possession shall have been recovered, shall be necessary for the payment of debts, legacies, annuities or charges of administration; and in that case, the said executor or administrator, having obtained license in manner as herein provided, shall have full right, power and authority to dispose and make sale of the whole or part of the lands, tenements or hereditaments aforesaid, subject however to the right of redemption, in case such sale be made before such right shall be extinguished.

CH. 52.

heirs: and may be divided as other estate, &c.

[Mass. Stat. Feb. 11, 1789, § 3.]

unless necessary to be sold for the payment of debts, &c.

SECT. 17. *Be it further enacted*, That after executors or administrators shall become seized and possessed of lands, tenements or hereditaments, by having the same set off in discharge of an execution as aforesaid, and before conveyance or assignment thereof in manner aforesaid, if the person, his heirs, executors, administrators or assigns, whose estate has been levied upon as aforesaid, shall within the time limited, redeem the same, the executors or administrators shall, in every instance, be entitled to receive the said re-

Executors or administrators to receive money from persons entitled to redeem estate set off, &c. and to discharge and release the same.

[Ib. § 4.]

(r) 1. An executor or administrator, to whom land is set off under the provisions of § 16, takes an estate in such lands in trust for the heirs, &c. and neither the legal estate, nor the possession rests in the heirs until the land is apportioned and distributed in the probate office, or until the administration has been settled, or it is ascertained that the land will not be wanted to discharge debts, &c.; and the administration bond is security for the faithful administration of such land, it being only a substitute for money due to the testator or intestate; and an executor or administrator may maintain an action for the same land against a stranger in possession. *Boylston adm. vs. Carver*, 4 Mass. 598. See *Hancock appt. vs. Minot*, ex. 8 Pick. 29.

2. The heirs of a mortgagee, as such, have not such an interest in the mortgage, as entitles them to enter, or to have an action for condition broken. *Smith & als. vs. Dyer*, 16 Mass. 18.

## CH. 52.

Proviso.

[\*235]

No executor to  
be sued within  
12 months—  
unless, &c.

[Mass. Stat.  
Feb. 14, 1789,  
§ 2.]

Proceedings in  
case of suits  
brought a-  
gainst admin-  
istrator within  
the year.

Writs and ex-  
ecutions to run  
against goods  
and estate of  
party deceased  
—not against  
executor or ad-  
ministrator's  
body or estate.

demption money, and are hereby authorized, empowered and directed to discharge the said estate, levied upon, by release, quitclaim, or other legal conveyance : *Provided*, That nothing in this and the sixteenth sections of this act contained\*, shall be construed to control any last will or testament, or any part thereof.

SECT. 18. *Be it further enacted*, That no executor or administrator shall be compelled in any Court of law to defend any suit that shall be commenced or instituted against him, in said capacity, within the term of twelve months next after his taking upon him that trust, unless the same shall be instituted for the recovery of a demand that will not be affected by the insolvency of the estate, or the suit shall be instituted for the purpose of ascertaining a claim that is contested (s). And all suits brought within one year as aforesaid (except for the purposes aforesaid) shall be continued at the plaintiff's expense, until that term from the time the executor or administrator gave bond in the Probate Court, for the faithful discharge of his trust, shall be fully expired, and in case the executor or administrator pay the demand, or will bring sufficient money into Court for that purpose, and there leave the same for the plaintiff's use, or shall make a legal tender thereof to the plaintiff within the year, he shall recover his costs.

SECT. 19. *Be it further enacted*, That all writs of attachment and executions shall run only against the goods or estate of the party deceased, in the hands of executors or administrators, and not against their bodies ; nor shall any executor or administrator be held to special bail upon mesne process, nor his own proper goods or estate be attached or his person (t) be arrested or taken in execution for the debts or legacies of the testator or intestate, but upon suggestion

(s) This exception must be confined to a case, in which an apparent insolvency has taken place within the year. *Hunt vs. Whitney, adm.* 4 Mass 624.

(t) 1. *Atkins & al. vs. Sawyer*, 1 Pick. 351.

2. According to § 19, writs have frequently issued commanding the officer to attach the goods or estate of a person deceased, and to summon the executor or administrator. *Cooke vs. Gibbs*, 8 Mass. 197.

of waste, founded on a return made by the Sheriff, that he could not find any goods or estate of the testator or intestate; in which case a writ commonly called *scire facias*(u), shall be issued out of the Clerk's office of the same Court, against such executor or administrator, and if upon said writ being duly served and returned, such executor or administrator shall make default of appearance, or coming in shall not show cause sufficient to the contrary, execution shall be adjudged and awarded against him, of his own proper goods and estate, to the value of such waste, where it can be ascertained; otherwise for the whole sum recovered, with interest thereon from the time when the first judgment was rendered\*; and for want of goods or estate, against the body of such executor or administrator.

CH. 52.

Proceedings on suggestion of waste.

[Mass. Stat. Mar. 4, 1784, § 9.]

[\*236]

SECT. 20. *Be it further enacted*, That whenever any executor or administrator shall die, or be removed from office, during the pendency of any suit brought by, or against him, in said capacity, the same suit may be prosecuted by, or against any administrator *de bonis non*, who shall thereupon be appointed, and process may thereupon issue in due form of law, to compel any such administrator *de bonis non* to become a party to the suit; and if such administrator *de bonis non* shall, after due service of such process, neglect or refuse to become a party to the suit, judgment may be rendered against him in the same manner as if he had voluntarily

Administrator *de bonis non*, may become party to suit commenced by previous administrator or executor—

[Mass. Stat. Feb. 24, 1818, § 19.]

(u) 1. Persons and property are made liable to attachment on *scire facias*, by ch. 463, § 2, vol. 3, p. 304.

2. Where an administrator commences an action, and fails to support it, judgment for costs is to be rendered against him *de bonis propriis*. *Hardy vs. Call*, 16 Mass. 580; See onward, note w, 2.

3. If an administrator of an estate represented insolvent, assume the defence of an action pending against his intestate, and neglect to suggest the insolvency on record and pray a stay of execution, so that execution is issued, and returned *nulla bona*, it is waste, and he is liable to a judgment and execution *de bonis propriis*. *Sturgis vs. Reed, adm.* 2 Glf. 109. See *Scott vs. Hancock & al.* 13 Mass. 162; and *Brown & al. vs. Anderson*, *ib.* 201.

4. Where an administrator, after judgment against him in that capacity, discovers new debts, and thereupon represents the estate insolvent, and proceeds regularly under the commission, the return of *nulla bona* on the execution does not support a suggestion of waste. *Ring vs. Burton*, 5 Glf. 45.

## CH. 52.

and have scire  
facias to com-  
plete judg-  
ments, and  
may perfect  
executions,  
&c.

and may bring  
and defend  
writs of error.

In case of  
death of either  
party after ap-  
peal and be-  
fore sitting of  
Court appeal-  
ed to, or be-  
fore final judg-  
ment, the exe-  
cutor or ad-  
ministrator  
may prosecute  
and defend,  
&c. if cause of  
action survive.

come in and become a party to the suit, and had therein been defaulted or nonsuited. And when judgment shall be had in any suit in which an executor or administrator is a party, and such executor or administrator shall afterwards die or be removed from office, in such case a *scire facias* may be sued and execution taken out upon such judgment, either by or against any administrator *de bonis non*, who shall be thereupon appointed, and any execution, which may have duly issued upon such judgment, may be perfected by either of said parties respectively; and a writ of error to correct any errors in such judgment may be brought in manner prescribed by law, either by, or against such administrator *de bonis non*, in like manner as might have been by, or against the original executor or administrator who was a party to such judgment.

SECT. 21. *Be it further enacted*, That in case of the death (v) of any party, either the appellant or appellee, before the sitting of the Court appealed unto, or where any action or suit is or shall be depending either in the Circuit Court of Common Pleas, or in the Supreme Judicial Court in any County of this State, and it so happen that either party be taken away by death before final judgment, the executor or administrator of such deceased party, who was plaintiff (w), complainant or defendant (in case the cause of action doth

(v) 1. The executor or administrator of a petitioner for a review, who died pending the petition, cannot be admitted to prosecute under § 21. *Woodward vs. Skolfield*, 4 Mass. 375.

2. See ch. 59, § 28, in this volume.

3. See note to § 27, ch. 59, in this volume.

4. If after the death of one party, and after his executor shall have become party to a pending suit of the deceased, the other party shall die, pending the same suit, the executor or administrator of the latter may become a party to it; and if he neglects so to do, after legal notice, judgment will be rendered against the estate of his intestate. *Hunt vs. Whitney*, 4 Mass. 620.

(w) 1. The executor of a plaintiff in replevin who dies pending the suit shall be admitted to prosecute. It is otherwise with the defendant. *Pitts Ex. vs. Hale*, 3 Mass. 322; *Mellen & al. vs. Baldwin*, 4 Mass. 480.

2. Where an administrator comes into court to prosecute a suit commenced by the intestate, and fails to support it, judgment for costs must be rendered against the estate of the intestate. *Brooks & al. adm. vs. Stevens*, 2 Pick. 68. See ante, note u, 2.



by law survive) (x) shall have full power to prosecute or defend any such suit or action from Court to Court until final judgment ; and the defendants or appellees are hereby obliged\* to answer to such actions accordingly ; and the Justices of the Circuit Court of Common Pleas and Supreme Judicial Court respectively, before whom such causes are or may be triable and depending, are hereby empowered and directed to hear and determine all such causes, proceed to judgment, and award execution accordingly : and if it shall so happen, that the executor or administrator of the deceased, hath not suitable time in the judgment of the Court where such action or suit shall be pending, and doth by law survive as aforesaid, to prepare for managing the cause, or to become duly qualified to prosecute or defend the same : in such case it shall and may be lawful for the Court to suspend the hearing and trying thereof until the next term. And if by the verdict of a Jury, or by the default or neglect of the executor or administrator, in prosecuting or defending such suit, after the executor or administrator shall have appeared and undertaken in his capacity to prosecute or defend the suit, judgment pass against the executor or administrator, the Supreme Judicial Court and Circuit Court of Common Pleas are hereby respectively authorized, empowered and directed, to enter up judgment for or against the estate of the deceased in

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[\*237]

[Mass. Stat.  
Mar. 4, 1794,  
§ 10.]Court may  
continue such  
actions in cer-  
tain cases.Judgment how  
rendered in  
such cases.

(x) 1. By the surviving of the cause of action is to be understood of such a cause as will enable the executor or administrator of the deceased to maintain a suit thereon against the survivor, or against his executors or administrators. *Mellen & al. vs. Baldwin*, 4 Mass. 481.

2. Where one by a tortious act acquires property of another, an action will lie against the executor or administrator of the wrong doer; but where by such act the deceased had no gain, the action dies with him. *Cravath vs. Plympton*, adm. 13 Mass. 454.

3. An action for a breach of a promise of marriage, where the injured party has suffered no special damage, will not survive in favor, nor against the executor or administrator of either party. *Stebbins vs. Palmer*, 1 Pick. 71.

4. Trespass *de bonis asportatis*, and trover and replevin may be commenced and maintained by the executor or administrator of the owner of the goods, general or special, against a tort-feasor; but not against his executors or administrators. *Mellen & al. vs. Baldwin*, 4 Mass. 480; *Jenney vs. Jenney*, 14 Mass. 231; *Jarvis, adm. vs. Rogers*, 15 Mass. 398; *Badlam vs. Tucker & al.* 1 Pick. 389.

**CH. 52.** their hands and under their administration, as the case may require.

When executor or administrator refuses to become party to suits, in cases aforesaid what proceedings shall be had.

[Mass. Stat. Mar. 17, 1784, § 1.]

Executor or administrator to be duly notified.

[\*238]  
Executors and administrators not bound to plead specially.  
[Mass. Stat. Mar. 10, 1784, § 9.]

**SECT. 22.** *Be it further enacted,* That all actions pending in the Supreme Judicial Court or in any Circuit Court of Common Pleas in this State, by appeal, continuance or otherwise, where the plaintiff or defendant, appellant or appellee, complainant or respondent shall die before final judgment, and the executor or administrator of the deceased party, after taking upon himself the said trust, shall neglect or refuse to become a party to the suit, the Court before whom such cause shall be pending, in case the cause of action does by law survive, may enter up judgment against the goods and estate of the deceased party, in the same way and manner judgment might have been, in case the executor or administrator had voluntarily after such death made himself a party to the suit : *Provided always,* That such executor or administrator be duly served with a notification from the Clerk of the Court where such suit is pending, fourteen days before the sitting thereof.

**SECT. 23\*.** *Be it further enacted,* That executors, administrators and guardians shall not be compelled to plead specially to any action or suit at law, brought against them in their said capacity ; but may under the general issue give any special matter in evidence (y).

**SECT. 24.** *Be it further enacted,* That the real estate (z)

(y) 1. Quere, whether an administrator can give in evidence, under the general issue, the insolvency of the estate of his intestate. *Foster vs. Abbot,* adm. 1 Mass. 234.

2. The infancy of his testator is a good plea by an executor to an action on a promissory note made by the testator. *Hussey & al. vs. Jewett, ex. 9* Mass. 101 ; *ib. Smith, vs. Mayo, & exrs.* 62 ; *Martin vs. Mayo & al. exrs.* 10 Mass. 139.

(z) 1. Lands specifically devised are liable to be levied upon by creditors of the testator, equally with other lands, of which he died seized. *Wyman vs. Brigden,* 4 Mass. 150.

2. And this notwithstanding a bond has been given by the executor, pursuant to ch. 51, § 15, p. 226 of this volume. *Id.*

3. The same may be done upon lands in the possession of the alienee of the devisee. *Bigelow vs. Jones,* 4 Mass. 513.

4. But such lands are not liable to be sold for the purpose of paying specific legacies. *Hubbell vs. Hubbell,* 9 Pick. 561.

of any testator or intestate is and shall be liable to be taken and levied upon by any execution issuing upon judgments recovered against executors or administrators in such capacity, being the proper debts of the testator or intestate, and that the method of levying, appraising and recording, shall be the same as by law is provided respecting other real estate levied upon and taken in execution, and may be redeemed by the executor, administrator or heir, in like time and manner.

## CH. 52.

Mode of levying executions on estates of persons deceased,  
[Mass. Stat. Mar. 4, 1784, § 7.]  
and of redeeming such estate.

SECT. 25. *Be it further enacted*, That the goods and estate of each deceased debtor in every joint contract, whether obligation, covenant or other instrument under seal, promissory note, memorandum in writing, or any other contract express or implied, or in any judgment on any contract, shall be liable in the hands of his executors and administrators for the payment thereof, in like manner (a) ; and the creditor shall have the same remedy, and may have and maintain an action against such executors and administrators in the same manner as if such contract had been joint and several.

Estate, &c. of deceased debtor on joint contract to be liable, as if joint and several, for payment of such contract, &c.

[Mass. Stat. Feb. 26, 1800.]

SECT. 26. *Be it further enacted*, That no executor or

(a) 1. Where one of two principal debtors on a joint promissory note is dead, and the money has been paid by a surety, he may file it in offset against a demand in favor of the estate of the deceased against him, under the provisions of § 25—and this though the estate has been represented insolvent. *Fox adm. vs. Cutts*, 6 Gif. 240.

2. The effect of this provision is to place the administrator in all cases of solvency, and the surviving partner, upon the same footing, as the original partners were, so far as it respects the right of action for any intermediate balances, which may be due from time to time *inter se*, before the final settlement of the partnership concerns. But where the estate of the deceased partner is insolvent, the surviving partner must cause a balance to be struck, and his claim therefor presented to the commissioners ; and the estate being distributed, he can have no remedy for future payments unless he should discover estate not accounted for by the administrator. *Wilby vs. Phinney*, adm. 15 Mass. 122. See *Goodwin vs. Richardson*, adm. 11 Mass. 476.

3. Whether the estate be solvent or insolvent, no action at common law can be maintained against an administrator, unless the claim has been filed before the commissioners. *Paine vs. Nichols*, adm. 15 Mass. 264.

4. Where money is paid for a principal by one surety after the death of a co-surety, an action for contribution lies against the executor of the latter, upon the implied promise of the testator. *Bache'der vs. Fisk & al. ex. 17 Mass. 464.*

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[Mass. Stat.  
Feb. 14, 1789,  
§ 3, & Feb.  
1792, § 3.]

administrator shall be held to answer to any suit that shall be commenced against him in that capacity, unless the same shall be commenced within the term of four years from the time of his accepting that trust (b) : *Provided*, Such executor or administrator shall give public notice (c) of his ap-

(b) 1. The general effect of this provision is to discharge the lien on the estate in the hands of the heir, after the expiration of four years ; and this was obviously one of the objects of the Legislature in making it. *Scott vs. Hancock*, 13 Mass. 164 ; see also, *ch. 62, § 12*, onward, in this volume.

2. To a plea of the statute of limitations by an executor of an estate represented insolvent, it is not a sufficient answer to say that the estate is solvent, and that *after* the lapse of four years a farther time was allowed by the Judge of Probate for creditors to exhibit and prove their claims, under which the demand in suit was duly proved. *Parkman vs. Osgood & als. exrs.* 3 Glf. 17.

3. If an administrator suffers judgment to pass against him, in an action barred by the statutes for limiting suits against executors and administrators, his sureties in his bonds are not bound by such judgment, but shall have the benefit of such statute, in an action against them on the bond. *Dawes vs. Shed & al.* 15 Mass. 6.

4. An executor or administrator is bound, *virtute officii*, to plead the limitations of § 26, whenever a debt claimed would be barred by it ; and if he omits to do so, he is guilty of waste. *id.* ; *Thompson vs. Brown & al.* 16 Mass. 178 ; see also, *Dickinson vs. Arms*, 8 Pick. 396.

5. Yet he may omit to plead the general statute of limitations in bar, if the debt be justly due. *Emerson vs. Thompson*, 16 Mass. 431.

6. This limitation may be pleaded in bar to a suit in equity as well as a suit at law. *Burditt vs. Grew*, *ex. 8 Pick.* 108 ; see also, *Codman vs. Rogers*, 10 Pick. 112 ; *Farnam vs. Brooks*, 9 Pick. 212.

7. A promise by an administrator or executor to pay a debt of the intestate, will not take a demand out of the limitations contained in § 26. *Brown & als. vs. Anderson*, 13 Mass. 201 ; *Dawes vs. Shed & al. ex.* 15 Mass. 6 ; *Richmond, adm. pet.* 2 Pick. 567.

8. But such promise will take it out of the general statute of limitations, and whether the promise be made by a former administrator or executor, or by the administrator *de bonis non*. *Emerson vs. Thompson*, 16 Mass. 432.

9. Yet such promise, by a partial payment of the debt by the administrator of a deceased joint promisor, will not revive the debt against the surviving joint promisor. *Hathaway vs. Haskell*, 9 Pick. 42.

10. To an action against an administrator *de bonis non*, upon a promise made by the intestate it is a good plea in bar, that four years since the original taking out of letters of administration, elapsed during the life of the former administrator. *Heard vs. Meader*, 1 Glf. 166.

(c) 1. The statute runs from the time of accepting the trust, not from the

pointment to that office in the manner directed† by law, and filing a claim with the commissioners upon an estate represented insolvent, shall be esteemed equivalent (*d*) to originating a suit against executors or administrators, within the meaning of this act.

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[† ch. 51. § 18, ante, p. 228.]

SECT. 27. *Be it further enacted*, That when any demand against the estate of any person deceased, arising from covenant, contract or agreement shall become due after the said term of four years, and which could not, by virtue of such covenant\*, contract or agreement, be claimed until after the said term, in such case, the claimant may, at any time within the said term of four years, file such demand at the Probate office where administration was granted, or the will was approved; and the Judge of Probate shall direct the executor or administrator to retain in his hands assets (if sufficient there be) to answer said demand, unless the heirs to such estate, or devisees thereof, or some one or more of them, shall give good and sufficient security, in the opinion of the Judge of Probate, for such executor or administrator to respond such demand; and when security is so given, such executor or administrator shall not be allowed to retain in his hands assets for the purpose aforesaid; the estate of the said deceased shall however be liable, in the hands of the said heirs (*e*) or devisees, or their heirs or assigns, to answer the said demand.

Provision for case of demand on contract, &c. not due until after 4 years; and proceedings therein.

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[Mass. Stat. Feb. 14, 1798, § 4.]

time of giving public notice, &c. *Sewall & al. vs. Valentine*, 6 Pick. 276.

2. In pleading this statute it is sufficient for the defendant to allege that he gave bond, &c. without setting it out; and that he posted up notifications of his appointment "in some public place," &c. without specifying the places. *ib.*; *Burditt vs. Grew*, ex. 8 Pick. 108.

(*d*) 1. *Guild & al. vs. Hale*, ex. 15 Mass. 455.

2. Whether an *application* to the Judge of Probate *within* four years from the granting of letters of administration, for further time for creditors to exhibit and prove their claims, is equivalent to a *suit*, so as to prevent the operation of the statute of limitations, the new commission not issuing till after the four years—*Quere*. *Parkman vs. Osgood & als.* ex. 3 Glf. 17.

(*e*) 1. The liability of heirs on the covenant of their ancestors, is by the operation of § 27 and 28, rendered contingent—depending on the inability of the creditor, from the nature of his claim, to have satisfaction during the existence of an administration. *Webber & al. vs. Webber*, 6 Glf. 127.

## CH. 52.

When demands arise on covenant, &c. after expiration of the 4 years, they may be enforced against the heirs, if prosecuted or claimed within one year.

[Ib. § 5.]  
Proviso as to actions by devisees, legatees, &c.

SECT. 28. *Be it further enacted*, That where demands against the estate of any person deceased, arise by virtue of any covenant, contract or agreement that could not be claimed until after the said term of four years, the claimant in such case, unless he shall have filed the same in the Probate Court, as aforesaid, may have his remedy against those (f) who inherit the estate of such person, or devisees thereof, against whom the demand lies, if such claim be made within one year from the time of its becoming due, and not against the executor or administrator : *Provided always*, That nothing in this act shall operate to bar any action that may be commenced against an executor or administrator with the will annexed, for the recovery of a legacy, bequest, gift or annuity, arising, accruing or becoming due by virtue of any last will and testament, but the same may be commenced and prosecuted in the same time, way and manner, as they might have been, had this statute never been made. [Approved March 21, 1821.]

Additional Act, ch. 342, Vol. 3, p. 187.

2. It is clear that when the right of action accrues within the four years from the time when notice of the administration is given, no action will lie against the heir. *Boyce vs. Burrell & al.* 12 Mass. 395; *Webber & al. vs. Webber*, 6 Glf. 138.

3. Lands descending in another State are not assets in this State, by which the heirs of a covenantor may be charged. *Austin vs. Gage & al.* 9 Mass. 395.

(f) 1. In a deed of conveyance, it is not necessary that the heirs of the grantor should be named, in order to give the grantee, after the death of the grantor, the remedy against them on the covenants, provided in § 28. *Webber & al. vs. Webber*, 6 Glf. 127.

2. By virtue of § 28, no action lies against the husband of one, who inherited personal property from the covenantor, after the death of the wife. *Howes vs. Bigelow*, 13 Mass. 384.

3. Whether the claim must not be put in suit within one year after becoming due, as well as demanded, *quere. Ib.*

4. It is obvious that in making this provision, the legislature contemplated an expiration of the duty of the executor or administrator; and for that reason gave the action directly against the heir. *Boyce vs. Burrell & al.* 12 Mass. 399.

## Chapter 53.\*

CH. 53.

AN ACT to prevent Frauds and Perjury.

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SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That no action shall be brought whereby to charge an executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant, upon any special promise (a), to answer for the debt, default or

Enumeration of promises, void if not in writing.

[Mass. Stat. June 19, 1789, § 1.]

(a) 1. The consideration for a collateral undertaking need not be recited in the note or memorandum signed by the party to be charged. *Levy & als. vs. Merrill & al.* 4 Glf. 180; *King vs. Upton*, ib. 387; *Packard vs. Richardson & al.* 17 Mass. 128.

2. A special promise to pay a pre-existing debt, is not within the statute, and may be proved by parol. *Dillingham vs. Runnels.* 4 Mass. 401.

3. There are numerous decisions establishing the distinction between agreements *executory* and agreements *executed* in whole or in part. The statute of frauds is applicable to the *former*, but not to the latter. *Ricker & al. vs. Kelly & al.* 1 Glf. 120.

4. The doctrine of part performance is not admitted, except in courts of equity. *Freeport vs. Bartol*, 3 Glf. 340.

5. Part performance of a parol agreement relating to an interest in land does not take the contract out of the statute of frauds, so as to sustain an action at law for damages for the breach of the contract. But *assumpsit* will lie for the expenses incurred in such part performance. *Kidder vs. Hunt*, 1 Pick. 328. See below, note b, 6.

6. Where one wrote his name in blank upon the back of a promissory note, as a guarantor of the payment, and authorized another to write a sufficient guaranty over the name, it was held to be a memorandum in writing signed by the party, within the meaning of the statute of frauds, and parol testimony was received to prove such authority. *Ulen vs. Kittredge*, 7 Mass. 233.

7. Where the law raises a promise, the case is not within this statute. *Goodwin & al. vs. Gilbert & al.* 9 Mass. 514.

8. Where the promise is prospective, to pay the debt of another, which may accrue in consequence of the very promise which is made, this is considered as not affected by the statute. The consideration is then co-existing with the promise; and it is the original debt of the party making the promise. *Perley vs. Spring*, 12 Mass. 298. See *Towne vs. Grover*, 9 Pick. 306.

9. The statute applies to a mere promise by one party to pay money to another, as well as to a mutual agreement where each party stipulates to do something. *Cabot & al. vs. Haskins & al.* 3 Pick. 83.

**CH. 53.** misdoings of another person, or to charge any person upon any agreement made upon consideration of marriage†, or upon any agreement that is not to be performed within the space of one year, from the making thereof; and no action shall hereafter be maintained upon any contract for the sale of lands, tenements or hereditaments, or any interest in, or concerning the same, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing (*b*), and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.

[†See p. 231,  
note x, 3.]

All leases, &c.  
not in writing,  
to have no oth-

**SECT. 2.** *Be it further enacted,* That all leases, estates, interests of freehold, or terms of years, or any uncertain in-

(*b*) 1. If a contract in writing be signed by the party sought to be charged, it is sufficient to take the case out of the statute of frauds, though it be not signed by the party seeking the remedy. *Barstow vs. Gray*, 3 *Glf.* 409.

2. The auctioneer, in a sale of lands, is the agent of both parties; and his entry of the purchaser's name on his book or memorandum containing the particulars of the contract is a sufficient signing, within this statute. *Cleaves vs. Foss*, 4 *Glf.* 1. See *Davis vs. Rowell & al.* 2 *Pick.* 64.

3. It is not necessary that the auctioneer's authority should be in writing. *Alna vs. Plummer*, 4 *Glf.* 258.

4. It is sufficient if the memorandum be made by the auctioneer's clerk, if in the presence of both parties and the auctioneer. *Ib.*

5. Where one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise; the promise need not be in writing. *Dearborn, Treasurer, vs. Parks*, 5 *Glf.* 81.

6. A parol agreement for the conveyance of land is not absolutely void by the statute of frauds; but if any act has been done in part execution of the agreement, which would not have been done but on account of it, which was done with a view to the agreement, and which is prejudicial to the party doing it, the parties are not permitted to treat the agreement as a nullity. *Davenport vs. Mason*, 15 *Mass.* 85.

7. A. having received a conveyance of land from B. made a verbal promise that he would on a certain day thereafter, make a defeasance thereof, so that the same should operate as a mortgage, such promise was holden to be void by the statute of frauds. *Boyd vs. Stone*, 11 *Mass.* 342. See also, *Sherburn vs. Fuller*, 5 *Mass.* 133.

8. The claim of a right to enter upon the land of another to repair a dam necessary to the working of a mill, and originally erected with the consent of the owner of the soil, cannot be maintained but by showing a grant, or a prescriptive right, as it is barred by the statute of frauds. *Cook vs. Stearns*, 11 *Mass.* 536.



terests of, in or out of, any messuages, lands, tenements or hereditaments, made or created by livery and seizin only, or by parole, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only (c); and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parole leases or estates notwithstanding. And no leases, estates or interests (d), either of freehold or term of years, or any uncertain interest of, in, to or out of, any messuages, lands, tenements or hereditaments, shall at any time, be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents† thereunto lawfully authorized by writing, or by act and operation of law.

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er effect than leases or estates at will.

[Mass. Stat. Mar. 10, 1784, § 1.]

No leases, &c. shall be assigned, granted or surrendered, unless, by deed or writing, signed, &c.

[†See ch. 220, vol. 3, p. 49.]

SECT. 3\*. *Be it further enacted*, That no contract for the sale of any goods, wares, or merchandize (e), for the

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(c) 1. A tenant at will is not entitled to notice to quit, but he is to be allowed a reasonable time for the purpose of removing his family and property. What is a reasonable time is a question of law. *Ellis vs. Paige & al.* 1 Pick. 43.

2. The same point is doubted, in *Coffin vs. Lunt*, 2 Pick. 71; where it is ruled, that if the tenant at will is so entitled to notice, the notice must be regulated by the terms of his contract; as where the letting is by the month, a month's notice is sufficient.

3. See also ch. 268, § 4, vol. 3, p. 97.

(d) The right in equity of redeeming real estate mortgaged, is such an interest in land as cannot, by our statute of frauds, be found by parol. *Scott & al. vs. McFarland, adm.* 13 Mass. 311.

(e) 1. A contract for the sale of merchandise was holden to be binding on the party signing a memorandum thereof, although he had no counterpart thereof; although the signature of such party was above and not below the body of the memorandum; and although it did not specify the weight of the merchandise contracted to be sold. *Penniman vs. Hartshorn & al.* 13 Mass. 87.

2. Such a contract to sell, without delivery, does not pass the property. *Id.*

3. A parol sale of the timber standing on land, to be cut and carried away within a reasonable time, would at least amount to a license which need not be in writing, and which would protect the vendee in cutting,

## CH. 54.

No contract for sale of goods for \$30 or more, good unless in writing or partly executed.  
[Mass. Stat. June 19, 1789, § 2.]

price of thirty dollars or more, shall be allowed to be good, except the purchaser shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized. [Approved March 8, 1821.]

Additional Act, ch. 358, Vol. 3, p. 209.

## Chapter 54.

AN ACT establishing a Supreme Judicial Court within this State.

Court established.

[Mass. Stat. July 3, 1782, § 1.]

Jurisdiction, &c.

[So much of § 1, repealed, as requires two Justices to constitute a quorum, in all cases. See ch. 219, § 9, vol. 3, p. 49.]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That there shall be a Supreme Judicial Court within this State, to consist of one Chief Justice and two other Justices, each of whom shall be an inhabitant of this State, of sobriety of manners and learned in the law, to be appointed and commissioned as is by the Constitution provided, and they or any two of them, shall be a Court, and have cognizance of pleas real, personal and mixed ; and of all civil actions between party and party, and between the State and any of the citizens thereof, whether the same do concern the realty, and relate to right of freehold, inheritance or possession, whether the same do concern the personalty, and relate to any matter of debt, contract, damage or personal injury ; and also all mixed actions, which do concern the realty and personalty brought legally before the same Supreme Judicial Court, by appeal, review, writ of error, or otherwise ; and in all such actions real, personal and mixed, to give such judgment, and award such execution, as the common rules of justice and the laws of this State shall direct ; and shall take cognizance of all capital and other offences and misdemeanors whatsoever of a public nature, tend-

against an action of trespass by the original owner. *Erskine vs. Plummer*, 7 Gif. 451.

ing either to a breach of the peace, or the oppression of the citizen, or raising of faction, controversy or debate, to any manner of misgovernment ; and of every crime whatsoever that is against\* the public good, and shall by virtue of their office, be severally conservators of the peace throughout the State. And upon all persons duly and legally convicted before the said Court, of crimes, offences or misdemeanors, to inflict such punishment as by the laws of the State is provided. And in case of legal conviction, where no punishment by statute law is provided, then the said Court shall punish the person so convicted, according to the common usage and practice within this State, not repugnant to the Constitution, according to the nature of the offence. And said Court are hereby invested generally with all the jurisdiction, power and authority, except in relation to the appointment of Clerks†, and enjoined to perform all the duties, which by existing laws adopted by the Constitution, and not repugnant thereto, appertain and belong to the Supreme Judicial Court. And may issue all manner of writs, executions, certificates and processes whatever, for carrying into effect and authenticating any judgment, order or adjudication whatever, which may have been rendered in the late Supreme Judicial Court, in any county within this State, prior to the sixteenth day of March last ; and all suits, writs, executions, certificates and processes, when so issued, shall be of the same effect, and be executed, levied and extended in the same manner, as if issued on any judgment, order or adjudication of the Court hereby created ; and all records and documents of the late Supreme Judicial Court, now remaining in the several counties in this State shall be placed and remain under the control and authority of the Supreme Judicial Court of this State, in the same manner and for the same purposes as the records and documents of their own doings, and the Clerk of the same Court shall have the like power in relation to the one as the other of those records and documents.

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[†See ch. 80,  
in this volume.]

SECT. 2. *Be it further enacted*, That the same Supreme Judicial Court, may by certiorari (a) or other legal methods,

May order the  
proceedings of  
inferior courts

(a) 1. Upon certiorari an order of notice issues, and upon a return of the record the Court inspect it, and, if they find errors, will quash the proceed-

## CH. 54.

to be brought  
before them.

[Ib. § 2.]

[\*243]

And adminis-  
ter oaths.

And punish for  
contempts.

Process to  
hear test of the  
first Justice.

cause to be brought before them, as well indictments or other criminal prosecutions or civil proceedings pending in, as the records of sentences, orders, decrees, and judgments of any Court of inferior, criminal or civil jurisdiction, and to proceed, order and award thereon, as is or shall be by law provided and directed. And the said Supreme Judicial Court is\* empowered to impose and administer all oaths, as well those that are necessary for promoting justice between party and party as those necessary to the conviction and punishment of offenders; and to punish at the reasonable discretion of the Court, all contempts committed against the authority of the same; and the said Court shall have power to issue all writs of prohibition and mandamus, according to the law of the land, to all Courts of inferior judiciary powers, and all processes necessary to the furtherance of justice, and the regular execution of the laws.

SECT. 3. *Be it further enacted*, That all writs and processes of the same Court, shall be in the name of the State

ings without an assignment of errors, which is necessary upon a writ of error. *Com. vs. Sheldon & als.* 3 Mass. 188.

2. Where the error is merely in the forms of the proceedings, not affecting the substantial justice of the cause, the court will refuse the writ of *certiorari*. *Ex parte, Miller*, 4 Mass. 565; *Weston & als. ex parte*, 11 Mass. 417; *Freetown vs. Bristol*, C. C. 9 Pick. 46.

3. This court will not grant a *certiorari* to bring before them the proceedings of a Court Martial. *Ex parte, Dunbar*, 14 Mass. 392.

4. A *certiorari* will not be granted unless probable cause be shown for supposing injustice has been done in the court below. *Lees vs. Childs*, 17 Mass. 351.

5. Where the proceedings of the court below are, in any stage of them, different from the course of the common law, the only mode of correcting any error that may have occurred is by a writ *certiorari*. *Melvin vs. Bridge*, 3 Mass. 305; *Edgar vs. Dodge*, 4 Mass. 670; *Com. vs. B. H. T. Corp.* 5 Mass. 420; *Com. vs. Ellis*, 11 Mass. 465.

6. Judgment for costs cannot be rendered upon a *certiorari*, but only the proceedings affirmed or quashed. *Ib.*

7. *Certiorari* does not lie to quash proceedings in the location of a town way. *Harlow vs. Pike*, 3 Glf. 438.

8. *Hayward Pet.* 10 Pick. 358; *Gile vs. Moore*, 2 Pick. 386; *Clark vs. Com.* 4 Pick. 125; *Com. vs. Hall*, 8 Pick. 440.

of Maine, bear test (*b*) of the first Justice, who is not a party to the suit, and shall be under the seal of the same Court and signed by the Clerk. CH. 54.  
[Ib. § 3.]

SECT. 4. *Be it further enacted*, That the same Supreme Judicial Court, shall and may, from time to time, make, record, and establish all such rules and regulations with respect to the admission of Attornies and Counsellors, ordinarily practising in the said Court, and all other rules† respecting modes of trial, and the conduct of business, as the discretion of the same Court shall dictate. *Provided always*, That such rules and regulations be not repugnant to the laws of the State. May make rules for the admission of attornies, &c.  
[Ib. § 4.]  
[†1 Glt. 410.]  
Proviso.

SECT. 5. [Repealed, see ch. 219, § 9, vol. 3, p. 49.

It provided the times of holding the S. J. Court in the several\* counties for the year 1820.] [\*244]

SECT. 6. *Be it further enacted*, That all actions and civil suits of every name and kind, which may be pending in the Supreme Judicial Court for the counties of Cumberland and Oxford : or for the counties of Kennebec and Somerset ; or for the counties of Hancock, Washington and Penobscot, on the first day of April next ; which shall have been originally commenced in the Courts of Common Pleas for the counties of Oxford, Somerset, Washington or Penobscot respectively ; all petitions in which the petitioner may be an inhabitant of either of said counties, and all indictments against any person or persons for offences committed within either of said counties, shall be transferred and removed to, entered, heard, tried, and proceeded upon, at the Supreme Judicial Court, then next to be holden within the said counties of Oxford, Somerset, Washington and Penobscot respectively, within which the said actions originated and were commenced, the said petitioners reside, and the said offences may have been committed ; and all the papers and documents, belonging to all such actions, suits, petitions and indictments,\* shall be delivered over to the Clerks of the said counties of Oxford, Somerset, Washington and Penobscot respectively. And all appeals which may be made from Actions now pending.  
[\*245]

(*b*) 1. Ripley, ex. vs. Warren, adm. 2 Pick. 592.

2. Taylor vs. Henry, 2 Pick. 397.

CH. 54. any Court of Common Pleas, and all recognisances which may be taken, and all offences which may be committed within either of the said counties of Oxford, Somerset, Washington and Penobscot, after the first day of the terms of the Supreme Judicial Court to be holden prior to the first day of May next, for the counties of Cumberland and Oxford, and for the counties of Kennebec and Somerset, and for the counties of Hancock, Washington and Penobscot respectively, shall be entered, heard, tried, prosecuted and proceeded upon, at the Supreme Judicial Court then next to be holden within and for the said counties respectively, where the appeals may be made, the recognisances may be taken, and the offences may be committed.

SECT. 7. [Repealed; see ch. 219, § 9, Vol. 3, p. 49.]

It empowered one Judge to adjourn the Court in case a quorum was not present.

Judgment how  
to be entered  
in certain  
cases.

[Mass. Stat.  
Feb. 13, 1816,  
§ 1 & 2.]

SECT. 8. *Be it further enacted*, That when at any term of the Supreme Judicial Court holden or to be holden in any county, any actions shall have been continued *nisi* for advisement by the Court, or for argument by consent of parties, and the Justices of said Court shall have determined the same before the next term of said Court holden in the same county, it shall be lawful to enter judgment upon said actions as of the last term of said Court, at which said actions shall have been continued, or at the succeeding term. And whenever the Clerk of said Court in any county shall enter a judgment upon any action by order of the Justices of said Court out of term time, he shall enter upon his docket\* the time when he shall receive such order, and all liens created by attachment on mesne process in said actions, shall continue and be in force for and during thirty days after the then next term of the Supreme Judicial Court for said county, any thing in the law to the contrary notwithstanding.

[\*246]

Reporter to be  
appointed.

[Mass. Stat.  
Mar. 8, 1804,  
§ 1.]

SECT. 9. *Be it further enacted*, That the Governor, by and with the advice of the Council, shall, as soon as may be after the passing of this act, appoint some suitable person, learned in the law, to be a Reporter of the decisions of the Supreme Judicial Court, who shall be sworn to the faithful discharge of his duty, and shall be removable at pleasure of the Executive; whose duty it shall be, by his personal at-

tendance, or by any other means in his power, to obtain true and authentic reports of the decisions, which may hereafter be made by said Court, and shall publish the same whenever they will compose a suitable volume. CH. 55.

SECT. 10. *Be it further enacted*, That the said Reporter shall receive out of the Treasury of this State, six hundred dollars annually, which together with the profits arising from the publication of his said reports, shall be a full compensation for his services aforesaid ; and that the money, paid by persons admitted to practise as Attorneys in the Supreme Judicial Court shall be a fund for the payment of said sum : and if insufficient, to be paid out of any other monies in the Treasury not otherwise appropriated. His salary. [Ib. § 2.]

SECT. 11. *Be it further enacted*, That this act shall continue in force during the term of three years from the passing the same and no longer. [Approved June 24, 1820.] [§ 11, repealed. Vide ch. 200, vol. 3, p. 22.]

Additional Act, ch. 200, vol. 3, p. 22. See also ch. 219, vol. 3, p. 45.

### Chapter 55.

AN ACT to alter the times of holding the Supreme Judicial Court, and Circuit Court of Common Pleas, in the County of Cumberland\*.

[\*247]

[Repealed, see ch. 234, vol. 3, p. 63, and ch. 326, vol. 3, p. 172.]

[Approved March 21, 1821.]

### Chapter 56.

AN ACT in addition to "An Act establishing a Supreme Judicial Court within this State."

**BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That in all actions, petitions, and civil suits pending before the Supreme Judicial Court, wherein any two of the Judges of said Court, have been of counsel for either party, or are otherwise interested in such actions, petitions or civil suits, one of the Justices of said Court, who has not been counsel or otherwise interested

In certain cases, one Judge to have full power to hear and decide causes.

CH. 57. as aforesaid, shall have full power and authority to hear, adjudge, and determine said actions, petitions, and civil suits with or without the intervention of a Jury, as the parties may by their pleadings, or agreed statements of facts, render necessary according to law ; any thing in the act, to which this is an addition, to the contrary notwithstanding. [Approved March 8, 1821.]

### Chapter 57.

AN ACT defining the powers of the Judicial Courts in granting Reviews and for other purposes.

When there is cause to set aside a verdict, a review may be granted, [Mass. Stat. June 18, 1788, § 1.] [\*248]

after due notice, and on condition.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That wherever there shall have been any legal cause for any Judicial Court before judgment, to set aside any verdict, but nevertheless judgment\* shall have been rendered on such verdict, the party aggrieved by such judgment may petition the Justices of the Court, at any of their terms, for a review of such cause ; and the said Justices on due notice to the adverse party, and full consideration (a) of such petition, are hereby empowered (if they see fit) to grant a review (b) of the said cause on such

(a) 1. The affidavit of a petitioner in such case may be used on the hearing of the petition, to prove facts, known to himself only. *Coffin vs. Abbot*, 7 Mass. 252.

2. Depositions of other persons are not received on such hearing, unless taken with the usual forms, as depositions in the trial of a cause. *Ib.*

(b) 1. Where a witness, whose testimony was in favor of the prevailing party in a cause, is afterwards convicted of perjury in giving such testimony, the Court, in the exercise of its discretion under this statute, will grant a writ of review. *Morrill, petr. vs. Kimball*, 1 Glf. 322.

2. A writ of review cannot be granted in a criminal case, under any of the provisions of this act. *Wells' case*, 2 Glf. 322.

3. Reviews are had only in actions commenced by writ. *Borden vs. Bowen*, 7 Mass. 93 ; *Pope vs. Pope*, ex. 4 Pick. 129.

4. Whether the provisions of this statute extend to prosecutions under the statute for the maintenance of bastard children. *Quere*; *Gowen, ex parte*, 4 Glf. 58.



terms and conditions† as to them may seem just and reasonable between the said parties.

CH. 57.

SECT. 2. *Be it further enacted*, That whenever by reason of any accident, mistake, or any unforeseen cause, judgment shall have been rendered on discontinuance, nonsuit, nil dicit, non sum informatus, report of referees, or default, or suits may have been discontinued without judgment, to the

[† See ch. 502, vol. 3, p. 350.]

When by reason of accident, mistake, &c. judgment has been rendered,

[Ib. § 2.]

5. Whether the process by petition for partition is within the meaning of this statute, *quere*. *Sturdivant vs. Greely & als.* 4 *Glif.* 534.

6. But if it is, no review can be had of either one of the judgments in partition, without the other. Therefore, where the judgment *quod partitio fiat* was rendered upon demurrer, the title of the petitioners not being contested, but a mistake was made by the commissioners, which was not discovered till after the final judgment; it was held that a review could not be granted, for the correction of this error. *Ib.*

7. By the subsequent statute of Feb. 7, 1828, judgments upon petitions for partition are open to review. See ch. 384, vol. 3, p. 233. But the application for such review must be made within three years after the rendition of the judgment complained of. See ch. 432, vol. 3, p. 276.

8. No new trial or review will be granted on account of newly discovered evidence which is merely cumulative. *Warren vs. Hope*, 6 *Glif.* 479.

9. Reviews and new trials will be granted where a material witness, whose testimony at the trial was against the interest of the petitioner, has discovered since that he testified incorrectly by mistake. *Ib.*

10. Or when the newly discovered evidence relates to confessions or declarations of the other party respecting a material fact, and inconsistent with the evidence adduced by such party at the trial. *Ib.*

11. Or where such evidence was placed beyond the knowledge or control of the petitioner, by means of the other party, and with a view to prejudice the petitioner's cause. *Ib.*

12. A writ of review does not lie upon a judgment rendered on a report of referees. *Dickerson vs. Davis*, 4 *Mass.* 520. See *Stone & als. vs. Davis & als.* 14 *Mass.* 360.

13. A writ of review is a writ of right, in the nature of a *scire facias* to hear errors, in a record or process remaining with the court. *Burrell vs. Burrell*, 10 *Mass.* 222.

14. A review commenced and discontinued is not a bar to another review in the same action, if not prevented by other limitations. *Ib.*

15. A review may be granted on the petition of a trustee, who suffered a default upon a *scire facias*. *Ex parte, Packard*, 10 *Mass.* 426. See *Perry vs. Goodwin*, 6 *Mass.* 498.

## CH. 57.

S. J. Court may grant a review, also in *all* civil actions, when reasonable.

[Mass. Stat. June 18, 1791, § 2.]

In case of judgments rendered in Common Pleas or before Justice under certain circumstances,

[Mass. Stat. June 18, 1788, § 8.]

Court may grant a review on petition of party injured;

provided application be made within 3 years.

[†Howe vs. Hapgood, 13 Mass. 490.]

When review is granted, a writ to be sued

hindrance or subversion of justice, the said Justices, on petition as aforesaid, are further empowered to grant a review of the action. And the said Justices shall be, and they are hereby vested with discretionary power, to grant reviews in all (c) civil actions, in manner as aforesaid, whenever they shall judge it to be reasonable, without being limited to particular cases.

SECT. 3. *Be it further enacted*, That wherever, by reason of any of the causes mentioned in the last enacting clause, any judgment in the Circuit Court of Common Pleas, or before any Justice of the Peace, may have been rendered in manner as in the same clause is mentioned; or any appeal may have been prevented or lost to the hindrance or subversion of justice as aforesaid; and the party aggrieved shall produce in, and file with the Clerk of the Supreme Judicial Court a copy of record of the cause duly attested, and shall petition the Justices of the same Court for a review of the cause, in manner as aforesaid, the said Justices may grant a review of the said cause in manner aforesaid to be heard and determined in the said Supreme Judicial Court: *Provided*, That application be made to the Justices of the said Court within three years after the rendition of the judgment complained of, and only one† review shall ever be granted in any action by virtue of this act.

SECT. 4. *Be it further enacted*, That whenever a review is granted by virtue of this (d) act, a writ of review shall be

(c) 1. The S. J. Court, in the exercise of its general power to grant reviews in all cases, will not sustain an application for the review of an action in a Justice's Court, where the party may have redress in the C. C. Pleas. *Merrill vs. Crockett*, 6 Glf. 412. See ante, note a, 5.

2. The discretionary power, under this section, does not extend to appeals from probate courts. *Dean vs. Dean*, 2 Mass. 150.

(d) 1. When granted under *this* statute the writ must be entered at the next following term, unless otherwise specially provided in the order of the Court by which the review is granted. *Hobart vs. Tilton*, 1 Glf. 399.

2. But since the foregoing decision, the S. J. Court may allow entry of writs of review at the second term after being granted, by *ch. 347, § 5, vol. 3, p. 195*.

3. It is further provided by *ch. 502, § 4, vol. 3, p. 351*, as follows:—

“That all writs of review shall be served within one year from the term when judgment is rendered on the verdict in the original action.”

sued out and prosecuted to final judgment and execution. And the\* party bringing such action of review, shall produce in Court attested copies of the writ, judgment and all papers used and filed in the former (e) trial, and each party shall have the liberty to offer any further evidence; and the whole cause shall be tried in the same manner as if no judgment had been given thereon: and the former judgment may be reversed in whole or in part, or greater damages or less, or no damages may be given, as the merits of the cause upon law and the evidence shall appear to require.

SECT. 5. *Be it further enacted*, That the Justices aforesaid to whom any petition shall be preferred in manner aforesaid, are further empowered to stay execution in the cause on such conditions (f) as are before mentioned; and whenever the same Justices shall adjudge that the petitioner shall take nothing by his petition, they are also empowered to award the respondent his costs, and execution may be sued out accordingly.

SECT. 6. *Be it further enacted*, That whenever by reason of any accident, mistake (g) or unforeseen cause, an appeal in a civil action or complaint may not be entered at the Supreme Judicial Court at the proper term of said Court for entering the same, the Justices of the same Court be, and they are hereby empowered, on the petition of the party, at their discretion, to order such appeal or complaint, to be entered at any other term of said Court, within the county where the judgment appealed from shall have been rendered; and to proceed to try the appeal or affirm the former judgment, with additional damages and costs†, in the same manner as they might have done if the said appeal or complaint had

CH. 57.

out and prosecuted:  
[\*249]

Proceedings.  
[Mass. Stat. Feb. 26, 1787, § 1, 2.]  
Former judgment may be reversed in whole or part, &c.

Execution to stay, on condition, &c.

[Mass. Stat. June 18, 1788, § 5.]

Costs.

When by accident or mistake, &c. an appeal or complaint was not entered at the proper term, S. J. Court may order the entry at any other term,

[Mass. Stat. June 18, 1791, § 1.]

and try the cause.  
[†See ch. 444, vol. 8, p. 286.]

(e) The deposition of a person used in a former trial is competent evidence in a review, though the deponent is a party to the suit, having become administrator of one of the original parties. *Gold vs. Eddy, adm.* 1 Mass. 1.

(f) See ch. 502, § 3, vol. 3, p. 351; *Luckport vs. Keen*, 7 Mass. 500; *Bingham vs. Pepoon & al.* 9 Mass. 340; *Bacon vs. Otis*, 11 Mass. 407; *Rice vs. Townsend*, 14 Mass. 366.

(g) 1. The mistake or accident must be specified in the petition of the party so as to enable the Court to judge thereof. *Jackson vs. Goddard*, 1 Mass. 230.

2. The petitioner will be confined to the facts and witnesses named in the petition. *Warren vs. Hope*, 6 Glf. 479.

## CH. 57. hindrance

S. J. Court  
may grant a  
review, also  
in all civil ac-  
tions, when  
reasonable.  
[Mass. Stat.  
June 18, 1791  
§ 2.]

In case  
judgment  
rendered  
Comm  
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tic  
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s.

and  
by  
&c.

Mass. Stat.  
June 18, 1791,  
§ 2.]

A person  
whose claim a-  
gainst an in-  
solvent estate  
has been re-  
jected by com-  
missioners, and  
who by mis-  
take, &c. has  
omitted or  
may omit to  
give notice of  
his intention to  
sue at common  
law,

[See ch. 51,  
§ 25, ante, p.  
233.]

term for entering the same ; and  
by vested with all the discretionary  
appeals or complaints with which  
the cases of petitions for review mention-  
ed, That no petition for entry of such  
writ shall be sustained, unless such petition  
be presented to the Court within one year after the  
entry of such appeal or complaint ought to have been  
made. And provided also, That no goods or estate at-  
tached or bail given upon the original writ shall be affected  
by any thing done by force of this section ; but the same  
shall remain discharged, notwithstanding the entry of any  
such appeal or complaint as aforesaid.

SECT. 7. *Be it further enacted*, That every Circuit  
Court of Common Pleas within this State be, and they are  
hereby vested with the same powers respecting appeals made  
from judgments rendered by Justices of the Peace, and com-  
plaints for not entering the same ; and also respecting all  
actions and suits before Justices of the Peace wherein the  
damage laid does not exceed twenty dollars, and wherein  
the defendant has been defaulted for want of actual notice  
of the suit, or by some other accident or mistake, with which  
the Justices of the Supreme Judicial Court are by this act  
vested, respecting appeals from judgments rendered by Cir-  
cuit Courts of Common Pleas, and complaints for not enter-  
ing the same, and respecting the granting reviews in the cer-  
tain other actions or suits before mentioned, wherein the de-  
fendant has been defaulted, or lost his law.

SECT. 8. *Be it further enacted*, That in all cases in  
which any person shall have presented any claim for allow-  
ance to any Board of Commissioners which may have been  
appointed by any Judge of Probate, to receive and examine  
the claims against the estate of any deceased person, which  
may have been represented insolvent, and such claim shall  
have been rejected by such commissioners†, and a return of  
their doings made to the Judge of Probate, and the claim-  
ant, who has or may prefer such claim for allowance has by  
accident, mistake or otherwise, omitted to give notice, or  
shall hereafter omit to give notice at the Probate Office,

within twenty days after the making of such return of the commissioners, that it is his or her intention to have such claim determined at common law, the Supreme Judicial Court, at any session thereof, holden in any county, upon such claimant's presenting a petition for relief, and making it to appear that he or she has reasonable grounds for expecting to support his or her claim, and that he or she has [not ?] lost his or her right to institute a suit against the executor or administrator of such estate, and have such claim determined at common law, by his or her negligence, is hereby authorized and empowered after due notice to the adverse party, to grant such claimant a right to institute a suit for the recovery\* of such claim against the executor or administrator of such insolvent estate, at the next Circuit Court of Common Pleas, to be holden in the county in which such executor or administrator dwells ; and the same proceedings shall be had in such suit, as are by law provided in suits instituted by claimants for the recovery of claims against insolvent estates, which have been rejected by the commissioners appointed to receive and examine the claims against such estates : *Provided however*, That no such petition shall be sustained unless the same shall be presented within two years from the return of the report of such commissioners to the Judge of Probate and that the distribution of any insolvent estate which may have been made previously to the presenting of such petition and notice thereof to the executor or administrator of such estate, shall not be disturbed by the judgment which may be recovered in any such suit ; nor shall the right to institute any such suit be granted to any claimant after four years shall have elapsed, from the time of granting administration on such estate.

SECT. 9. *Be it further enacted*, That in all such cases where any married man shall have absented himself from this State abandoning his wife, and not making sufficient provision for her support (*h*) or maintenance, the Justices of the Supreme Judicial Court are hereby authorized at any of the

CH. 57.

[Mass. Stat.  
Dec. 4, 1816.]

Court may petition to institute a suit, &c.

[\*251]

Proceedings to be thereupon had, in such case.

Proviso—

Such application must be made within two years, &c.

Any previous distribution of estate, not to be disturbed, by after judgment.

No such relief to be granted after the lapse of 4 years from grant of administration.

Sup. Court may license a married woman, to sell her real or personal estate in certain cases,

(*h*) See "An Act authorizing Judges of Probate, in certain cases, to appoint Guardians to married women;" *ch.* 380, *vol.* 3, *p.* 230; also, *ch.* 485, *vol.* 3, *p.* 334.

CH. 57. terms of the said Court, upon the application of any such wife, to empower and enable her during the absence of her husband from this State, and no longer, in her own name (i) to make and execute any contract either under seal or otherwise, and by deed to sell and convey any estate real or personal, of which at the time of such sale, she shall be seized or possessed in her own right; and to commence, prosecute and defend any suit in law or equity to final judgment and execution, in the same manner as if she was sole and unmarried; or the said Justices may grant to any such wife any or all the powers above described according as they shall judge the circumstances of such wife shall require.

[Mass. Stat.  
Nov. 21, 1787,  
§ 1.]

and to prosecute and defend actions as a feme sole, &c.

If husband return he shall be liable on contracts of wife.

[\*252]

[Ib. § 2.]

Suit of the wife not to abate by his return.

SECT. 10. *Be it further enacted*, That if any such husband should return into this State while any contract made by his wife, pursuant to the powers aforesaid should remain undischarged,\* the same remedy shall lie against such husband, as if the contract had been made by her before the marriage; and no suit pending, wherein his wife shall be a party, pursuant to the said powers, shall abate by his return into this State.

Court to give notice, &c. before granting such powers to wife.

[Ib. § 3.]

SECT. 11. *Be it further enacted*, That when application shall be made by any wife for any or all of the powers aforesaid the Justices of the said Court, shall previous to their granting any of the powers aforesaid, cause such public notice (j) of the said application to be given as by law they are directed in case of any libel filed by any married woman for a divorce. [Approved March 15, 1821.]

Additional Act, ch. 502, Vol. 3, p. 350.

(i) At common law the deed of a married woman is *ipso facto* void, unless joined by the husband; nor when joined by the husband, is she liable on any of the covenants, further than as they operate as an estoppel. *Fowler vs. Shearer*, 7 Mass. 21, and *Colcord & al. vs. Swan & ux. ib.* 291.

(j) 1. An order to give notice by publishing in a newspaper three weeks successively is complied with, by publishing in such paper in three successive weeks, although there be not an interval of a week between either of the publications. *Bachelor vs. Bachelor*, 1 Mass. 256.

2. Rule, to shew cause why a writ of review should not be quashed, was granted on affidavit of the party stating that he had no notice of the application for the writ of review. *Clap vs. Joslyn*, 1 Mass. 129.

## Chapter 58.

## CH. 58.

AN ACT extending the powers of the Justices of the Supreme Judicial Court, in certain cases.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That whenever any person who may have been arrested and in custody, or in prison, to answer for any crime or crimes, offence or offences, before the Supreme Judicial Court, shall be acquitted thereof by the Jury of trials; or shall not be indicted by the Grand Jury, by reason of the insanity or mental derangement of such person, and the discharge, or going at large of such person shall be deemed by the same Court to be dangerous to the safety of the citizens, or to the peace of the State, the said Court be, and hereby is authorized and empowered to commit† such person to prison, there to be detained till he or she be restored to his or her right mind, or otherwise delivered by due course of law. And every person so committed shall be kept at his or her own expense, if he or she have estate sufficient for that purpose; otherwise at the charge of the person or town, upon whom his or her maintenance would have been legally chargeable, if he or she had not been committed as aforesaid.

Persons acquitted on trial in Sup. Jud. Court, on ground of Insanity, &c. may be committed to prison until restored to reason, &c.

[Mass. Stat. June 19, 1816, § 1.]

[† § 1 modified, by ch. 474, vol. 3, p. 320.]

At whose expense.

SECT. 2. *Be it further enacted*, That whenever the Grand Jury, upon any inquiry which they may hereafter make as to\* the commission of any crime or offence by any person, shall omit to find a bill for the cause aforesaid, it shall be the duty of such Jury to certify the same to the said Court. And whenever the Jury of trials, upon the general issue of not guilty, shall acquit any person for the cause aforesaid, it shall be the duty of such Jury, in giving in their verdict of not guilty, to state that it was for such cause.

If no indictment is found by Grand Jury, nor conviction by Traverse Jury for such cause, they shall so certify to the Court. - [253]

[Ib. § 2.]

SECT. 3. *Be it further enacted*, That any one of the Justices of the Supreme Judicial Court, or any two Justices of the Peace, *quorum unus*, within their county, may discharge (a) from confinement any such person, when it shall be made to appear to his or their satisfaction, that the going at large of such person will not be dangerous to the safety of the citizens and to the peace of the State.

A Judge of the S. J. Court, or two Justices, quorum unus may discharge a person so convicted.

[Ib. § 3.]

(a) Or commit, originally. See onward, ch. 111, § 6.

## CH. 59.

S. J. Court, or any one of the Judges, or two Justices quorum unus, on application of friends of a lunatic may commit him to the custody of such friend—on bond being given, &c.

[Ib. § 4.]

[See ch. 51, § 49, p. 248, of this vol.]

SECT. 4. *Be it further enacted*, That upon the application of any friend or friends of such lunatic person, the Supreme Judicial Court, or any one of the Justices thereof, or any two Justices of the Peace, *quorum unus* (b), of the county in which such person may have been in prison, as aforesaid, be and are hereby authorized and empowered to commit to the custody and safe keeping of such friend or friends, such lunatic person: *Provided however*, That such applicant or applicants shall first give bonds, with sufficient surety or sureties, to the Judge of Probate for the county in which such lunatic is confined, conditioned for the safe keeping of such lunatic person, and for the payment of all damages which any person may sustain, by reason of the acts and doings of such lunatic; which bond shall be approved by the Court, Justice or Justices aforesaid, and may be put in suit for the benefit of persons interested, in like manner as is by law provided in case of probate bonds: *Provided*, That nothing in this act contained, shall deprive any person of the benefit of the writ of habeas corpus. [Approved March 17, 1821.]

Additional Act, ch. 474, Vol. 3, p. 320.

[\*254]

## Chapter 59.\*

AN ACT regulating Judicial Process and proceedings.

Mode of serving writs of attachment and summoning defendant.

Mass. Stat. Feb. 17, 1793, § 1.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That when the goods or estate of any person shall be attached at the suit of another, in any civil action, a summons in form prescribed by law, shall be delivered to the party whose goods or estate are attached, or left at his or her dwelling house or place of last and usual abode, fourteen days before the day (a) of the sitting of the Court where such attachment is returnable;

(b) It is only necessary that one of the Justices should be of the *quorum*. *Gilbert vs. Sweetser*, 4 Glf. 483.

(a) Meaning the first day of the term. *Anon. 5 Mass.* 193.



and if the defendant was not at any time an inhabitant (b) or resident within this State, or has removed therefrom, then such summons shall be left with his tenant, agent or attorney; and such service shall be made by the officer to whom the writ may be directed who shall return the same according to the precept thereof: and if such defendant shall not have a tenant, agent or attorney within the State, and his goods or estate shall be attached as aforesaid, the officer shall return the writ with his doings thereon; and such action being duly entered, the Court may order such notice to the defendant, as justice may require.

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SECT. 2. *Be it further enacted*, That in all suits wherein the process is by original summons, as against executors, administrators or guardians, in ejectment, dower, scire facias, error, review, and all other civil actions wherein the law does not require a separate summons to be left with the defendant, the service thereof by the proper officer shall be good and valid in law, either by his reading the writ or original summons to the defendant, or by leaving a certified copy (c) thereof at his or her house or place of last and usual abode, fourteen days before the same is returnable; and in all real actions, where the defendant or defendants in review live out of the State, so that the writ of review cannot be served upon him or them, the service of such writ upon the tertenant or person in possession shall be deemed a good and sufficient service, and the defendant or defendants shall be held to answer thereupon accordingly.

Mode of serving original summons, &amp;c.

[Ib. § 2.]

in writs of review, where defendants are out of State.

SECT. 3\*. *Be it further enacted*, That in all (d) actions [•255]

(b) When it appears to the court that neither the defendant, nor any property of his, is within the jurisdiction of the commonwealth, the court will stay all further proceedings. *Lawrence vs. Smith & al.* 5 Mass. 362.

(c) The blank form of a trustee writ was made use of to effect an attachment, but the plaintiff did not insert the name of any trustee; and the defendant was served with a copy of the writ. Held, that this process was valid, by virtue of stat. June 16, 1798, § 1—[ch. 61, § 5, in this volume.] *Badlam ex. vs. Tucker & al.* 1 Pick. 389.

(d) 1. The provisions of § 3, are not to be restricted to those cases only in which the defendant has property in this State; but extends to all cases where the process is by original summons. *Nelson vs. Omaley*, 8 Glf. 218.

2. *Peck vs. Warren*, 8 Pick. 163.

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Mode of service, when defendant was never an inhabitant of State, &c.

[Ib. § 3.]

wherein the process shall be by original summons as aforesaid, and the defendant was at no time an inhabitant or resident within this State, or has removed therefrom, then the service thereof shall be in like manner by the proper officer's reading the same to, or leaving a like copy duly attested with the tenant, agent or attorney of the defendant, the like number of days before the day of the sitting of the Court whereto the same process shall be returnable; and if such defendant shall not have a tenant, agent or attorney within the State, the Plaintiff or demandant may enter his action and the Court may order notice to the defendant in the manner provided in the first section of this act.

In actions of dower and other real actions, summons to be also served on *tertenantis*.

[Ib. § 4.]

SECT. 4. *Be it further enacted*, That in actions of dower and other real actions, wherein the possession of land or buildings shall not be demanded in the writ of the tenant in the actual possession or occupancy thereof, in addition to a service on the defendant in the writ or summons as aforesaid, there shall be a service on such tenant the like number of days before the day of the sitting of the Court by the proper officer's reading to him or her the same writ or original summons, or leaving a like certified copy at his or her house or place of usual abode on the premises, which shall also be certified by the proper officer; or the writ shall abate.

Mode of service of process on joint contracts, when one or more defendants live out of the State.

[Ib. § 6.]

SECT. 5. *Be it further enacted*, That when two or more are jointly obligated by act of law or agreement, and one or more of them are without the State, having property or estate, but no tenant, agent, trustee or attorney within the same, the property or estate of those so without the State, may be attached, and the summons being left by the officer serving the writ, with those within the State, shall be deemed a legal service on those without the same: *Provided*, one continuance shall be granted, unless the plaintiff can show that notice has been given to the person so out of the State, in which case the Court may proceed at their discretion, without granting a continuance.

Continuance to be granted in case—

Mode of service on towns, proprietors, &c.

[\*256]

SECT. 6. *Be it further enacted*, That when a suit shall be brought against any town, parish, or against the proprietors of any common or undivided lands or other estate, the plaintiff\* shall cause the Clerk of such town, parish or propri-

etors, or one or more of the Selectmen of such town, or assessors of such parish, to be served with a copy of the writ of summons, at least thirty days before the day of the sitting of the Court to which the same shall be returnable (e).

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SECT. 7. *Be it further enacted*, That when a suit (f) shall be brought, and no one of the defendants named in the writ, shall, at the time of the service thereof, be an inhabitant or resident within this State, or then be present within the same, and shall not return before the time of trial; or if the action shall be grounded on a tort, and any one of the defendants shall so be absent or not inhabitant or resident, and not return; then the court wherein such suit shall be pending, shall continue the same to the next term, on a suggestion of the fact being made on the record. And if the defendant, whose absence was noted on the record, shall not then appear by himself or attorney and be so remote that the notice of such suit pending could not probably be conveyed to him or her during the vacation, the said Court may further continue the action to the next term, and no longer. And in such cases where judgment shall be entered up by default after one or two continuances as aforesaid, execution or writ of seizin shall be stayed and not issue until the plaintiff or demandant shall have given bond (g) with sufficient sureties in double the value of the estate or sum recovered by such judgment, to make restitution, and to refund and pay back such sum as shall be given in debt or damages; or so much as shall be recovered upon a suit therefor, to be brought in one year next after entering up the first judgment; if upon such suit the judgment shall be reversed, an-

When none of the defendants are in the State at the time of service, nor return before the time of trial; what proceedings are to be had--

[Ib. § 5.]

as to continuance—

judgment, and execution.

(e) *Bullard vs. Nantucket Bank*, 5 Mass. 100.

(f) Provisions of § 7, do not apply to a process of foreign attachment; but in such process, if the principal shall be absent, the cause shall be continued to the third term, under the provisions of ch. 61, § 3, vol. 1, p. 287. *Spratt vs. Webb*, 1 Glf. 325.

(g) 1. If an execution be issued in such case, without the previous filing of a bond, it cannot be avoided collaterally, but is good till superseded. *Gardiner Man. Coy. vs. Heald*, 5 Glf. 381.

2. A writ of error does not lie to reverse a judgment against a defendant out of the State, because the plaintiff sued out his execution, without filing a bond pursuant to the statute. *Johnson vs. Harvey*, 4 Mass. 488.

## CH. 59.

Proviso as to  
plaintiffs giving  
personal  
notice to de-  
fendants, &c.

[\*257]

nulled or altered ; the security aforesaid to be no further answerable than for the recovery that shall be made on such suit, to be had within one year as aforesaid : *Provided nevertheless*, If any plaintiff or plaintiffs in any such suit shall at any time after the service of the original writ or summons as aforesaid, and thirty days before the term of said Court, in which judgment may be rendered in manner aforesaid, cause the defendant or defendants in the case (being out of this State) to be notified of such suit by serving him or them with an attested copy of such writ or summons, and the officer's\* return thereon, and shall file in said Court the deposition of one witness, being an inhabitant of this State, that such copy of said writ or summons was left with said defendant or defendants, or at his or their last and usual place of abode, in such case the plaintiff or plaintiffs may have his or their writ of execution or seizin, in the same manner as though the said defendant or defendants had appeared in said Court and made answer in said action, without such bond being given in manner aforesaid : *Provided also*, That no real estate taken in execution, granted upon such first judgment shall be conveyed by such plaintiff or demandant, until the expiration of the said one year, or after a new trial brought within the said space of one year.

All original  
writs to be  
endorsed, &c.

[Mass. Stat.  
Oct. 30, 1784,  
§ 11.]

SECT. 8. *Be it further enacted*, That all (h) original writs issuing out of the Supreme Judicial Court, or Circuit Court of Common Pleas, or from a Justice of the Peace, shall, before they are served, be endorsed on the back thereof by the plaintiff (i) or plaintiffs, or one of them, with his chris-

(h) 1. Writs of replevin must be endorsed. *Gould vs. Barnard*, 3 Mass. 200.

2. A writ of error need not be endorsed. *Greene vs. Danforth*, 16 Mass. 74.

(i) 1. Whether the clerk of a militia company, suing for a penalty, should endorse the writ with his own name, provided the captain has endorsed his approval of the suit as required by ch. 164, § 46, vol. 2, *quere*. *Abbot vs. Crawford*, 6 Glf. 214.

2. *A prochein ami* is a party, within the meaning of the statute, and his endorsement is good. *Crossen vs. Dryer*, 17 Mass. 222.

3. If the original writ be endorsed with the name of the plaintiff, "by A.

tian and surname, if he or they are inhabitants of this State, or by his or their agent or attorney, being an inhabitant thereof; and where the plaintiff is not an inhabitant of this State, then his writ shall be endorsed in manner aforesaid, by some responsible person who is an inhabitant of this State, provided that the Court may upon motion in consideration that the agent or attorney who endorsed the writ, is not of ability for the purposes hereafter mentioned, order that the plaintiff shall procure a new (j) endorser, and such new endorser shall

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New endorser  
in certain cases  
may be required.

B. his attorney," the attorney is personally liable for costs, under the provisions of § 8. *Davis vs. McArthur*, 3 Glf. 27; *Chapman vs. Philips*, 8 Pick. 25.

4. Such an endorsement also disqualifies the attorney from being a witness on the part of the plaintiff. *Chadwick vs. Upton & Trus*, 3 Pick. 442.

5. Want of an endorser on an original writ, must be pleaded in abatement at the return term. *Whiting vs. Hollister*, 2 Mass. 102.

6. Such a defect may be taken advantage of in abatement, either by plea or on motion, but cannot avail the defendant after pleading in chief. *Clapp vs. Balch*, 3 Glf. 216.

7. If the endorsement of a writ does not contain the whole christian name, and is not objected to by the defendant on that account, the endorser cannot afterwards take advantage of this omission to avoid his own responsibility. *Strout & al. vs. Bradbury & al.* 5 Glf. 313.

(j) 1. It is within the equity of this statute for the court to order on motion, a new endorser, where the plaintiff had endorsed the writ and subsequently absconded and left the State. *Oystead vs. Shed & als.* 8 Mass. 272.

2. Where the S. J. Court order a new endorser under the above provision, in an action originally commenced in the C. C. Pleas, an endorsement on the office copy of the original writ filed in this court, is sufficient to bind the endorser, without any endorsement of the original writ in the court below. *Hartwell vs. Hemmenway*, 7 Pick. 117.

3. A new endorser, who is substituted for the original endorser, is liable for all the costs recovered against the plaintiff, arising from the commencement of the action, not merely for those accruing subsequent to the new endorsement. *Ib.*

4. The court will not allow a change in an endorsement of a writ, without the consent of the defendant. *Ely & al. vs. Forward & al.* 7 Mass. 25; *Caldwell vs. Lovett*, 13 Mass. 422.

5. Where a person summoned as trustee is discharged and recovers judgment for costs against the plaintiff, the endorser of the writ is not liable for such costs, his liability only extending to costs recovered by the defendant. *Chapman vs. Philips*, 8 Pick. 25.

**CH. 59.** be held in the same manner as if the endorsement had been made before the writ was served, and unless the plaintiff shall procure such new endorser when directed thereunto by the Court, he shall become nonsuit, but no costs shall be awarded against him. And the plaintiff's agent or attorney who shall so endorse his name upon an original writ, shall be liable (k) in case of the avoidance or inability of the plaintiff to pay the defendant all such costs as he shall recover, and to pay all prison charges (l) that may happen where the plaintiff shall not (m) support his action.

Liability of endorser.

In what counties actions must be commenced.  
[Ib. § 13.]  
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**SECT. 9.** *Be it further enacted,* That when the plaintiff and defendant both live within the State, all personal or transitory actions shall be brought in the county where one of the\* parties(n) lives. And when an action shall be commenc-

(k) 1. The proper remedy against the endorser of a writ is by *scire facias*. *Reid vs. Blaney*, 2 Glf. 128; *How vs. Codman*, 4 Glf. 79.

2. In *scire facias* against the endorser, no interest is allowed on the judgment in the original suit. *Ib.*

3. The endorser of an original writ is not liable to the defendant for his costs, unless an execution be sued out within a year against the plaintiff, and he avoid it, or be committed to prison upon it; one of which facts must be alleged in a *scire facias* brought against the endorser for such costs. *Ruggles & al. vs. Ives*, 6 Mass. 494.

4. But the endorser is liable, although *scire facias* be not sued out within a year after judgment. *Miller vs. Washburn*, 11 Mass. 411.

5. The common law, that the agent acting in the name of his principal, does not bind himself, is altered by § 8, so far as it regards endorser of writs. *How vs. Codman*, 4 Glf. 79.

(l) "Prison charges" do not include the sheriff's fees on execution. *How vs. Codman*, 4 Glf. 79.

(m) 1. When the plaintiff appeals, and recovers a less sum than entitles him to costs, on the appeal, but costs are awarded the defendant on the appeal, the endorser of the writ is not liable for the defendant's costs. *Fairbanks vs. Townsend*, 8 Mass. 450.

2. When the plaintiff becomes nonsuit, the endorser is liable. *Talbot vs. Whiting*, 10 Mass. 359.

(n) 1. By parties, the legislature meant individuals, and not the inhabitants of a county, who sue or are sued as a corporation. The inhabitants of the county of A. cannot therefore in their corporate capacity maintain an action against an inhabitant of another county, in the C. C. Pleas for the county of A. *Lincoln Coy. vs. Prince*, 2 Mass. 544. See below, note p, 2.

ed in any other county than as above directed, the writ shall abate (o), and the defendant shall be allowed double costs. CH. 59.

SECT. 10. *Be it further enacted*, That any local or transitory action against the inhabitants of any county in this State, in their corporate capacity may be commenced and prosecuted to final judgment and execution (p), either in the county where the plaintiff in such action lives, or in the county against which the action shall be brought, at the plaintiff's election, and any local or transitory action in which the inhabitants of any county shall be plaintiffs, may be commenced and prosecuted to final judgment and execution, in the county where the defendant in such action shall live, un-

Where actions against county may be brought,

[Mass. Stat. Mar. 6, 1810, § 1.] and where actions in favor of county may be brought.

2. A turnpike corporation is not within the purview of § 9. *T. & S. B. T. Corporation vs. Whiting*, 9 Mass. 321.

3. When an action arises partly from matter of record, and partly from matter *in pais*, in different counties, the plaintiff may bring his action in either county. *Marshall vs. Hosmer*, 3 Mass. 23.

4. When an action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory, and may be sued as such; but when it is founded on privity of estate, the action is then local, and must be sued in the county where the land lies. *Lienow vs. Ellis*, 6 Mass. 332.

5. The design of the legislature appears to have been, that a defendant should not be called to answer out of his own county, except in a county where a plaintiff lived, or where a defendant lived, unless all the plaintiffs lived out of the State; in which case, the plaintiff or plaintiffs might elect their county. *Day & al. vs. Jackson & al.* 5 Mass. 239.

6. By ch. 359, vol. 3, p. 210, it is provided, that actions of assumpsit before a Justice of the Peace, in which there shall be two or more defendants living in different counties, may be brought in either county where either defendant lives. And the writ and execution is to be varied and obeyed in either county; and also in any county where personal property may be found and seized, belonging to either defendant.

(o) The defendant may waive the exception, and will be considered as waiving it, unless he seek the remedy by plea in abatement. The exception is not to the jurisdiction of the court, but to the writ. *Cleveland vs. Welsh*, 4 Mass. 592.

(p) 1. In judgments recovered against the inhabitants of a county, the estate of every inhabitant is liable to be taken in execution to satisfy such judgment. *Harokes & al. vs. Inhbts. of Kennebec*, 7 Mass. 463.

2. An action against the inhabitants of a county may be brought to the C. C. Pleas holden for the same county. *Brown vs. Somerset Coy.* 11 Mass. 221. See above, note n, 1.

**CH. 59.** less the defendant shall be an inhabitant of the same county, in which case the action may be commenced and prosecuted in either of the adjoining counties.

Where actions between corporations and counties are to be brought.

[Ib. § 2.]

Where actions by plaintiffs against their own counties are to be brought.

[Ib. § 3.]

Where actions by inhabitants of one county against inhabitants of another, shall be brought.

[Ib. § 4.]

Actions to be entered at C. C. Pleas first day of term.

[Mass. Stat. July 3, 1792, § 6.]

[\*259] Defendant not appearing, to be defaulted and damages assessed.

[Mass. Stat. Oct. 20, 1794, § 7.]

**SECT. 11.** *Be it further enacted,* That when any corporation shall be a party in any action commenced by or against the inhabitants of any county in this State, in their corporate capacity the action shall be commenced and prosecuted to final judgment and execution, in one of the counties adjoining the county interested in the same.

**SECT. 12.** *Be it further enacted,* That any local or transitory action against the inhabitants of any county by any plaintiffs belonging to such county, shall be commenced and prosecuted to final judgment and execution in such county, or in an adjoining county at the plaintiff's election.

**SECT. 13.** *Be it further enacted,* That any local or transitory action by the inhabitants of one county against the inhabitants of another county shall be commenced and prosecuted to final judgment and execution in an adjoining county.

**SECT. 14.** *Be it further enacted,* That no action shall be entered at any circuit Court of Common Pleas after the first day of the sitting thereof: *Provided nevertheless,* That where, by any inevitable misfortune or accident, the plaintiff shall be prevented from entering his action upon the first day of the sitting of the Court, he may upon making the same appear to the Court, enter his action at any time before judgment is given for cost to the defendant.

**SECT. 15\*.** *Be it further enacted,* That when any defendant shall be duly served with process, and return thereof shall be made into the Court where the same is returnable, and he shall not appear by himself, or his attorney, his default shall be recorded, and the charge in the declaration shall be taken and deemed to be true (q), and the Court

(q) 1. In an action where the principal suffers default, his sureties are not thereby precluded from any matter proper for their defence; the default is to be taken as true only against the party defaulted. *Foxcroft vs. Nevins & als.* 4 Glf. 75.

2. A judgment rendered upon default is valid, though it does not appear explicitly that the court inquired into the damages. *Jarvis vs. Blanchard,* 6 Mass. 4.



shall thereupon give such damages as they shall find upon inquiry that the plaintiff shall have sustained, unless the plaintiff shall move to have a Jury to inquire into the damages, in which case the Court shall enter up judgment for such damages as the Jury shall assess: *Provided nevertheless*, That if the defendant shall come into Court at any time before the Jury is dismissed, and shall pay down to the adverse party the costs he has been at, thus far, or so much thereof as the Court shall judge reasonable, then the Court may admit the defendant to have the same day in Court, as if his default had never been recorded.

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Default may be taken off, in case, on payment of costs.

SECT. 16. *Be it further enacted*, That no summons, writ, declaration, plea, process, judgment or other proceedings in the Courts or course of justice, shall be abated, arrested, quashed, adjudged insufficient or reversed, for any kind of circumstantial (*r*) errors or mistakes, when the person

Circumstantial errors, &c. may be amended on motion, &c.

[Ib. § 14.]

3. When after default, damages are assessed for the plaintiff either by the jury or the judge, and the judge admits illegal evidence, the party aggrieved may file exceptions to such admission, and thus bring the question before the whole court. *Storer vs. White*, 7 Mass. 448.

4. Papers filed in a case as evidence in ascertaining the plaintiff's damages after default, are no part of the record, nor can the court take notice of them upon a writ of error brought to reverse the judgment for such damages. *Ib.*

5. If a plaintiff recovers judgment by default, upon an account annexed to the writ, in which account credit is given the defendant for certain services at their full value, this judgment will be a defence to an action for the same services, brought by the same defendant against such plaintiff during the pendency of the first action. *Briggs vs. Richmond*, 10 Pick. 391.

(*r*) 1. The omission or insufficiency of the *ad damnum* in a writ, cannot properly be considered as merely a circumstantial error within the meaning of § 16, after the rendition of judgment. And therefore where no damages had been laid in the writ, the plaintiff after verdict and before judgment, may have leave to amend. *McLellan vs. Crofton*, 6 Glf. 307.

2. Leave to amend is granted at the discretion of the court; and the exercise of this discretion cannot be impeached by a bill of exceptions. *Wyman vs. Dorr*, 3 Glf. 183. See *Danielson & al. vs. Andrews & al.* 1 Pick. 156.

3. An amendment by which the plea is changed, so as to alter a plea of the case to a plea of *debt* or *trespass*, is not within the discretion of the court; to alter the writ and declaration in a writ of *entry* so as to make it a writ of

CH. 59. and case may be rightly understood by the Court, nor through defect or want of form only; and the Court, on motion made, may order amendments, but shall not allow costs, or grant a continuance in consequence thereof.

On nonsuit,  
&c. party pre-  
vailing entitled  
to his costs.

[Ib. § 9.]

SECT. 17. *Be it further enacted*, That when any plaintiff shall in any stage of his action become nonsuit (s), or discontinue (t) his suit, the defendant shall recover his costs against him, and in all actions, as well those of qui-tam as others, the party prevailing (u) shall be entitled to his legal costs.

right, has been refused; so has a motion to file a new declaration for a new cause of action, not contained in any original courts. *Haynes & ux. vs. Morgan*, 3 Mass. 210; *Phillips & al. vs. Bridge*, 11 Mass. 242. See *Bridge vs. Austin*, 4 Mass. 116; *Colt vs. Root*, 17 Mass. 229; *Swan & al. vs. Nesmith*, 7 Pick. 220.

4. If a writ be served by an officer, which he would be authorized to serve if it were directed to him, but which contains no such direction, the plaintiff may have leave to amend by inserting such direction. *Hearsey vs. Bradbury*, 9 Mass. 95; *Campbell vs. Stiles*, ib. 217; *Wood vs. Ross*, 11 Mass. 276.

5. When an action cannot be maintained in the names of all the plaintiffs, who have joined therein, if it could be maintained in the name of either alone, were he sole plaintiff, the court will authorize the names of the others to be stricken out. *Rehoboth vs. Hunt*, 1 Pick. 224.

6. The court will refuse to grant the plaintiff an amendment or repleader, if there appear to be in the circumstances of the action any peculiar hardship upon the defendant. *Dawes vs. Gooch*, 8 Mass. 488.

(s) 1. After a cause is opened to the jury the plaintiff cannot become nonsuit, unless allowed by the court. *Locke & als. vs. Wood*, 16 Mass. 317.

2. A nonsuit is only to be ordered at a trial for the insufficiency of the evidence on the part of the plaintiff; not on evidence produced by the defendant. *Rose vs. Learned*, 14 Mass. 154.

(t) It is not within the discretion of the court to disallow a motion of the defendant for costs, where the plaintiff discontinues his suit. *Gilbreth vs. Brown & al.* 15 Mass. 179.

(u) 1. If the plaintiff in review succeeds in correcting an error in a former verdict against him when he was original defendant, he is entitled to costs of review, as the party prevailing, though the accumulation of interest may have rendered the last verdict larger than the first. *Kavanagh & al. vs. Askins*, 2 Glf. 397. See *Bruce vs. Learned*, 4 Mass. 614.

2. Where a plaintiff in review becomes nonsuit, because no review lay

SECT. 18. *Be it further enacted*, That in all actions of trespass, quare clausum fregit hereafter brought, wherein the defendant shall in his plea disclaim all right, title and interest to the land in which the trespass is by the declaration supposed to be done, and the trespass be involuntary or by negligence, the defendant shall be admitted to plead a disclaimer, and that the trespass was done involuntarily† or by negligence, and a tender or offer of sufficient amends for

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On plea of disclaimer, &c. defendant may tender amends, [Mass. Stat. Feb. 13, 1787, § 2.]

[†See act passed Feb. 14, 1833.]

in the case, the defendant has his costs. *Treat vs. Hathaway & al.* 7 Mass. 503.

3. When several issues are made up and tried in the same cause, some of which are found against the "party prevailing," he is still entitled to his full costs under the provisions of § 17. *O'Brien vs. Dunlap*, 5 Glf. 281.

4. A submission of all demands between parties is a submission of the question of costs in the suit; and judgment relative to the costs must conform to the award of the referees. *Nelson vs. Andrews*, 2 Mass. 164.

5. In a trustee process, the plaintiff is entitled to costs against the defendant after default, until the final decision of the question whether the supposed trustee shall be held as such or not. *Wells & al. vs. Banister & tr.* 4 Mass. 514.

6. In replevin, if the jury find the plaintiff's property to be in part of the chattels, and not in the remainder, each party is entitled to damages and costs. *Powell vs. Hindsdale*, 5 Mass. 343. See ch. 186, vol. 3, p. 5; also, *Harding vs. Harris*, 2 Glf. 162.

7. Corporations, not being such in virtue of their locality, cannot tax costs for travel. *K. P. vs. Crossman*, 6 Mass. 458.

8. An error in the taxation of costs, by the omission of an item, may be corrected, after the issuing of execution, if there is any thing in the case to award by; it being a misprision of the clerk. *Wright vs. Wright*, 6 Glf. 415.

9. If a mistake arises in taxing costs, the remedy is by writ of error to reverse the judgment. *Field & als. vs. F. W. T. Corp.* 5 Mass. 389.

10. Where the court quash a writ of error, as having improvidently issued, they do not award costs to the defendant in error. *Jarvis vs. Blanchard*, 6 Mass. 4.

11. When a party, against whom costs are to be taxed, by himself or his attorney notifies the clerk that he desires to be present at the taxation, it is the duty of the clerk to give notice to such party or his attorney previous to his allowance of the costs taxed; and if the parties cannot agree, application is to be made to a judge at his chambers for his decision. *Dodd vs. Lewis*, 10 Mass. 26.

12. Where two defendants in an action for tort jointly plead not guilty, and one is found guilty and the other is acquitted, the latter is entitled to judgment for his costs. *Brown vs. Stearns & al.* 13 Mass. 586.

CH. 59. such trespass before the action brought; or the defendant may\* have leave to bring money into Court to satisfy the damage the plaintiff has sustained; and in case the Jury shall not assess greater damages for the trespass than the money tendered, or brought into Court, the defendant shall recover of the plaintiff his reasonable costs.

[\*260]  
or bring money into Court.  
Proceedings in such case.

In certain actions defendant may file account in offset;

[Mass. Stat. Oct. 30, 1784, § 12.]

time when and place where.

SECT. 19. *Be it further enacted*, That when an action shall be brought to recover a debt due on book (v) accounts, an account stated by the parties, a quantum meruit, quantum valebat or for services done upon an agreed price, or upon simple contract or promise in writing not under seal, the defendant may file any (w) account he hath in the Clerk's office seven days before the sitting of the Circuit Court of Common Pleas, where the action is brought, or if the suit is before a Justice of the Peace, the accounts shall be filed be-

(v) When a tradesman's day-book contains marks which shew the items transferred to his ledger, the ledger must be produced in evidence in support of the day-book. *Prince ex. vs. Swett*, 2 Mass. 569.

(w) 1. Notes may be filed in offset, by ch. 228, vol. 3, p. 60.

2. A promissory note, given to a third person by the defendant as surety for the plaintiff, and taken up by the defendant, with the creditor's receipt of payment from the defendant thereon, being duly filed in the Clerk's office by way of set off, is of itself sufficiently explicit as a demand for monies paid, within the meaning of § 19. *Fox vs. Cutts*, 6 Gif. 240.

3. Offsets are confined to transactions between the parties in the suit—therefore, in an action brought on a check, which had been assigned to the plaintiff, the defendant was not allowed to set off a negotiable note made by the drawer of the check and endorsed to the defendant. *Holland vs. Makepeace*, 8 Mass. 418; *Grew vs. Burditt*, 9 Pick. 265.

4. An account for board, lodging and washing is within the meaning of the statute, and may be filed in offset. *Witter vs. Witter*, 10 Mass. 225.

5. But a specific charge for rent of a room might well be excluded. *Ib.*

6. Nor can an account on merchandize consigned by the defendants to the plaintiffs, and improvidently sold by the latter, be filed in offset. *Adams & als. vs. Manning & als.* 17 Mass. 178.

7. In an action against two defendants upon a simple contract, a demand of one of them against the plaintiff cannot be given in evidence by way of offset. *Walker vs. Leighton & al.* 11 Mass. 140.

8. *Trusdell vs. Wallis*, 4 Pick. 65; *Grew vs. Burditt*, 9 Pick. 265; *Wright vs. Dunham*, 9 Pick. 37; *Etheridge vs. Binney*, *ib.* 272.

fore the Justice four days before the day of trial, and upon the general issue give the same in evidence against the plaintiff's demand. And if upon the trial it shall appear that there is a balance due to the defendant he shall recover the same in the same manner as if he had brought his action therefor (x). And where a plaintiff shall at the same Court bring divers (y) actions upon demands which might have been joined in one, he shall recover no more costs than in one action only.

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Defendant may recover any balance due him.

Regulation as to costs in certain cases.

SECT. 20. *Be it further enacted*, That when any person or persons shall be sued in ejectment, or other real action, for any lands, tenements or hereditaments, they shall be holden to answer for so much or such part of the premises demanded as they then hold or are in possession of which they shall distinguish and set forth by their plea, and disclaim (z) the rest ; and if any of them disclaim the whole,

In real actions defendant may disclaim in part or whole.

[Mass. Stat. Feb. 27, 1796, § 2.]

proceedings in such cases.

(x) Where the plaintiff, in an action before a Justice of the Peace, had leave to discontinue, the defendant could not have judgment for his account filed in offset. *Cummings vs. Pruden*, 11 Mass. 206.

(y) 1. It is further provided by ch. 184. vol. 3, p. 4. as follows :—

“ That whenever more than one suit shall be brought on a joint and several, or a several promissory note, made by two or more persons residing in the same County, costs shall be recovered in one suit only, unless the Court in which such additional suit or suits may be entered, shall certify that there was good cause for commencing and prosecuting the same.”

2. Where goods attached by the Sheriff on four writs, are replevied by as many writs of replevin, sued by the same party, on each of which a bond is given, and he puts them all in suit, he shall have costs in each action. *Morse vs. Hodsdon & als.* 5 Mass. 318.

3. A creditor who brings an action against each of several joint and several promissors, at the same term, is entitled to full costs in each action, notwithstanding the provisions of § 19. *Simonds vs. Center*, 6 Mass. 19.

4. This provision of the statute has been considered as applying to actions upon contract only, and not to actions for tort. *Ripley vs. Chandler*, 10 Mass. 175.

(z) 1. The plea of *non tenure* is not taken away by the provisions of § 20. *Fales p. vs. Thompson*, 1 Mass. 134.

2. A plea of *non tenure* without disclaiming was holden good. *Proust vs. Libby*, 14 Mass. 161.

3. A disclaimer may be pleaded in bar. *Prescott vs. Hutchinson*, 18 Mass. 439; *Otis vs. Warren*, 14 Mass. 239.

CH. 59. and the plaintiff cannot prove the defendant's possession of the premises, or any part thereof the defendant shall recover his costs.

Heirs may join or sever in actions for inheritance descended from a common ancestor.

[Mass. Stat. Mar. 9, 1796, § 3.]

SECT. 21. *Be it further enacted* (a), That in actions of waste, ejectment, or other real actions, where possession of the inheritance alleged to have descended, is the object of the suit, the heirs claiming under a common ancestor, may all or any two or more of them join therein, or each may prosecute for his particular share of such inheritance, and the same rule shall extend to joint tenants who are or may be disseized.

[\*261] Justices, Sheriffs, Coroners, &c. may in certain cases, on filing a brief statement, give special matter in evidence.

[Mass. Stat. Feb. 25, 1793.]

SECT. 22\*. *Be it further enacted*, That in all actions now depending or that may be hereafter depending in any Court within this State wherein the defence intended to be set up by the defendant, is or may be, that he was a Justice of the Peace, Sheriff, Deputy Sheriff, or Coroner or a town or parish officer, or some other officer, civil or military, and that the act or thing for which he is or may be sued, is or may be any act or thing done by him by virtue, or in the execution of his office, the defendant may plead the general issue, and give the special matter in evidence upon filing in the cause a brief statement (b) of such special matter of de-

4. *Owen vs. Bartholomew*, 9 Pick. 525.

5. See ch. 344, vol. 3, p. 190; and ch. 397, ib. p. 246.

(a) 1. The provisions of § 21, are confined to actions real or mixed, and do not extend to personal actions to recover damages only, which remain subject to the rules of common law. *Daniels & al. vs. Daniels & al.* 7 Mass. 136.

2. Tenants in common, and heirs, must join in detinue of charters, and in actions for the destruction of their charters or title deeds. *Ib.*

3. If heirs or joint tenants join in their action, notwithstanding the provisions of § 21, the disability of one demandant abates the writ as to all, whether it exists at the commencement of the action, or occurs afterwards. *Oznard & als. vs. K. Purchase*, 10 Mass. 179; *Cutts & als. vs. Haskins*, 11 Mass. 56; see *Sackett & al. vs. Sackett*, 8 Pick. 311.

4. But this objection is remedied in this State by the statute of Jan. 29, 1822, ch. 186, § 3, vol. 3, p. 6; See also, *Ryder & ux. vs. Robinson*, 2 Clf. 127.

(b) 1. The strictness required in pleading, is not applied to a brief state-

fence within such time as the Court shall order, of which statement the plaintiff shall be entitled to a copy, or he may plead specially at his election.

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SECT. 23. *Be it further enacted*, That upon a judgment rendered in any Circuit Court of Common Pleas, that the defendant shall account, it shall be in the power of the party against whom such judgment shall hereafter be given, to appeal therefrom, if such party shall think proper, before the same Court proceed to appoint auditors; and in case no appeal shall be made from the first judgment, that the defendant shall account, an appeal from the final judgment after the cause has been before auditors, shall not entitle the original defendant to try the issue of bailiff or not bailiff before the Supreme Judicial Court, but the first judgment that the defendant shall account shall remain in full force, and he shall account accordingly; and in case the defendant shall not enter and prosecute his appeal from the first judgment the same upon complaint may be affirmed; and auditors may thereupon be appointed in the same manner they would have been in the Circuit Court of Common Pleas, had no appeal been made from the first judgment.

In actions of account defendant may appeal from interlocutory judgment, before appointment of auditors.

[Mass. Stat. Feb. 17, 1786, § 1.]

Proceedings when he does not so appeal.

SECT. 24. *Be it further enacted*, That when any person against whom judgment shall be given, that he shall account, shall unreasonably refuse or neglect to appear at the time and place assigned by the auditors, or after appearing, shall refuse or neglect to render an account, the auditors may certify such refusal or neglect to the Court from which their appointment issued; and the same Court may thereupon cause damages to be assessed, by a jury and enter up judgment for the damages so assessed, with reasonable costs, or\* they may render judgment against the defendant as upon default.

When defendant shall refuse to appear before auditors—what proceedings may be had.

[1b. § 2.]

[\*262]

ment; which is an indulgence allowed to the officer for his benefit and relief. *Clark vs. Foxcroft*, 6 Glf. 302.

2. The defendant who files a brief statement under the provisions of § 22, has the right of opening and closing. *Bangs vs. Snow & al.* 1 Mass. 181.

3. Special pleading is abolished in all civil actions, by ch. 514, vol. 3, p. 368.

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[Mass. Stat.  
Feb. 28, 1919.]

State Treasurer, county, town and parish Treasurers may sue and prosecute actions, &c.

[Mass. Stat.  
June 22, 1797.]

Writ of review pending, if either party die, what proceedings are to be had.

Mass. Stat.  
Feb. 9, 1799,  
§ 3.]

SECT. 25. [Repealed; see ch. 347, § 8, vol. 3, p. 196.

It provided for the appointment of auditors to examine accounts, or vouchers, in actions where the Court might deem proper; also, for their report to be given in evidence to the Jury. See ch. 347, vol. 3, p. 198.]

SECT. 26. *Be it further enacted*, That (c) the Treasurer of this State, the Treasurers of counties, towns, parishes, and other corporations, for the time being, be and hereby are authorized and empowered, in their own names and capacities, respectively to commence, and prosecute to final judgment and execution, any suit or suits at law upon any bonds, notes or other securities, which have been or shall be given to them or their predecessors in said capacity; and to prosecute to final judgment and execution, any suits which have been or shall be commenced by their said predecessors in said capacity during their continuance in office, and pending at the time of their removal therefrom.

SECT. 27. *Be it further enacted*, That if pending a writ of review between the original parties whether in a real or personal action, either of them shall die (d), his death shall, at the request of the attorney for either party, be entered upon the records of the Court, and the cause shall thereupon be continued, to the end the heirs at law of such deceased party or other person interested in the tenements in question, as aforesaid, or his executors or administrators may come into Court, and take upon them the prosecution or de-

(c) 1. The right of towns to sue as before, is not taken away by § 26. *Inhbls. Newcastle vs. Bellard*, 3 *Glf.* 369.

2. A Treasurer may be substituted as an endorser upon a writ brought upon a probate bond in the name of the judge, in place of his predecessor who had originally endorsed the same. *Paine, Judge, vs. Gill & al.* 2 *Mass.* 136.

(d) 1. Under § 27, the administrator of a person who has died pending a writ of review brought on a judgment rendered against him for damages in an action of trespass *quare clausum fregit* may come in and prosecute the review. *Prop. of Great Beach vs. Rogers*, 1 *Mass.* 159.

2. Where the plaintiff in review dies pending the review, the original action being case for special damage from a common nuisance, in which the plaintiff in review was defendant, his administrator cannot become a party to the review. *Thayer vs. Dudley*, 3 *Mass.* 296; *Otis vs. Birby & al.* 9 *Mass.* 520.

3. See notes to § 21, ch. 52, p. 280, of this volume.



fence of the same suit to final judgment. And if after a reasonable time, according to the discretion of the Court, granted\* for this purpose, neither of them shall appear as aforesaid, or appearing shall afterwards become nonsuit, or be defaulted, then the same proceedings and judgment shall be had therein, mutatis mutandis, as would have been had between the original parties.

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SECT. 28. *Be it further enacted*, That whenever either of the parties to any judgment shall die before a review has been granted, the legal representatives of such deceased party may petition for such review or become parties to the same as respondents.

Legal representatives of party may petition for review in certain cases.

SECT. 29. *Be it further enacted*, That in the administration of oaths in this State, the ceremony of lifting up the hand, as heretofore used, shall be practised, with such exceptions as to Mahometans and other persons, who believe that an oath is not binding, unless taken in their accustomed manner, as the several Courts shall find necessary in the execution of the laws.

Manner of administering oaths in courts, &c.

SECT. 30. *Be it further enacted*, That no actions shall be sustained in any Circuit Court of Common Pleas within this State, where the damage demanded does not exceed twenty dollars, unless by appeal from a Justice of the Peace, saving such actions wherein the title to (e) real estate may be concerned; and if upon any action originally brought before the Circuit Court of Common Pleas, judgment shall be recovered for no more than twenty (f) dollars debt or dam-

Actions not sustained in C. C. Com. Pleas where ad damnum does not exceed \$20. [Mass. Stat. Mar. 11, 1784, § 8; Mar. 12, 1808, § 2.]

(e) 1. As in actions of trespass *quare clausum fregit* title to real estate may be concerned, this provision does not extend to such actions. *Dummer vs. Foster*, 7 Mass. 476; See *Butterfield vs. Pearson*, 10 Mass. 410.

2. Nor to actions of the case for an obstruction of a private way. *Crocker vs. Black*, 16 Mass. 448.

(f) 1. If the plaintiff's damages are reduced below twenty dollars by an account filed in offset, he is still entitled to full costs—such a case not being within the meaning of the provisions of § 30. *Hathorne vs. Cate*, 5 Glf. 74; See note g, 3, below.

2. Where in an action commenced in the C. Pleas the plaintiff obtained a verdict and judgment for more than twenty dollars, and upon an appeal by the defendant, and a trial in the S. Court the plaintiff recovered less than twenty dollars, it was held that he was entitled to no more costs than one

CH. 59. age; in all (g) such cases the plaintiff shall be entitled for his costs, to no more than one quarter part of the debt or damage so recovered: *Provided always*, That where judgment shall be rendered upon the report of referees, full costs shall be taxed for the party recovering notwithstanding the judgment be under twenty dollars, unless a different adjudication respecting the costs shall be made by the report (h) itself.

Costs in that Court when damages does not exceed \$ 20.

Proviso.

[Mass. Stat. Feb. 13, 1787, § 3.]

Debt to lie for penalties where no provision is made.

[Mass. Stat. Feb. 22, 1794, § 3.]

Penalties may be recovered by indictment where State is interested.

[\*264]

Printed copies of private acts and resolves, by authority, good evidence in Courts.

SECT. 31. *Be it further enacted*, That all penalties and forfeitures incurred under the provisions of any statute of this State, for the recovery of which no mode is prescribed, shall and may be sued for and recovered by action of debt in any Court proper to try the same.

SECT. 32. *Be it further enacted*, That all penalties and forfeitures given or limited by any act of this State, in whole or in part to the use of this State, may be recovered by indictment in any Court proper to try the same.

SECT. 33\*. *Be it further enacted*, That the printed copies of the private acts and resolves of this State, which now are, or hereafter shall be printed by and under the authority of the Legislature of this State, shall be admitted as good evidence thereof in all courts of law, without any further proof whatsoever.

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quarter of the damages recovered by him. *Lakeman vs. Morse*, 9 Mass. 127; See *Lincoln vs. Goulding*, 3 Mass. 234.

(g) 1. This will apply to actions of replevin, by a fair construction of stat. 1822, ch. 186, § 2, vol. 3, p. 5. *Ridlon vs. Emery*, 5 Glf. 261.

2. For a case of taxation, under this provision, See *Waite vs. Garland*, 7 Mass. 452.

3. If the plaintiff's damages are reduced below twenty dollars by an account in offset, he is still entitled to full costs; but not, if he proved that the items of the account in offset were delivered in part payment of the plaintiff's account. *Barnard vs. Curtis*, 8 Mass. 535.

4. This provision is applicable to actions under the trustee-law. *Denham vs. Lyon & Trus.* 1 Mass. 15.

(h) 1. Costs arising before referees and the costs of witnesses on the question of accepting their report, are taxable by the party recovering judgment, although the report of the referees be not accepted. *Tinkham vs. Meigs*, 16 Mass. 450.

2. When referees award concerning writs, judgment must conform to their award. *Nelson vs. Andrews*, 2 Mass. 164.

**SECT. 34.** *Be it further enacted,* That upon the judgment for debt, damages or costs, which has been, or which shall be rendered and recorded by any (i) Court of record, or any Justice of the Peace of this State, and remaining in force and unsatisfied, an action of debt may be brought in the same Court, or before the same Justice where such record remains, or in any Court of record, or before any Justice of the Peace, holding Pleas for the county in which either of the parties to such judgment, their executors or administrators shall dwell and reside at the time of bringing such action, and proper to try the same. And such judgment may be certified by the Clerk, for the time being of the Court, or by the Justice of the Peace, with whom such record remains.

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Action of debt may be brought on any judgment rendered in this State.

[Mass. Stat. Feb. 26, 1796, § 1.]

In what county or Court.

**SECT. 35.** *Be it further enacted,* That upon the judgment for debt, damages or costs which has been, or which shall be rendered and recorded by a Court of record in any other (j) of the United States, or by a Court of record of

Action of debt may be brought on judgment rendered in any other State;

(i) 1. A judgment rendered in Massachusetts against a citizen of Maine, before the separation, may be revived in the same court by *scire facias* though the defendant is not resident in that commonwealth; the jurisdiction of both Courts as to processes brought to execute such judgments, remaining unaffected by the separation, by stat. 1819, ch. 161, § 1, art. 8, adopted into the Constitution of Maine, art. 10, § 5. *Mitchell vs. Osgood & als.* 4 *Glif.* 124.

Such judgment will be received by the Courts of this State as conclusive evidence of debt. *Ib.*

3. An action of debt on a foreign judgment, where the plaintiff is not a citizen of this State, may be brought in any county in the State. *Ib.*

(j) 1. A court of another State must have had jurisdiction of the parties, as well as of the cause, for its judgment to be entitled to the *full faith and credit* mentioned in the Constitution of the United States. *Bissell vs. Briggs*, 9 *Mass.* 462.

2. Judgments rendered in the courts of another of the United States, when produced here as the foundation of actions, are not to be considered as foreign judgments; because the jurisdiction of the courts being established, the *merits* of the judgments are not to be inquired into. Neither are they to be considered as domestic judgments, rendered in our own courts of record; because the *jurisdiction* of courts rendering them is a subject of inquiry. But so far as the courts had jurisdiction, they are to have full faith and credit in our courts. They may therefore be declared on as evidence of debt, or of promise; and on the general issue the *jurisdiction* of the

**CH. 59.** the United States and remaining in force and unsatisfied, an action of debt may be brought in any Court of record of this State, holden for the county in which either of the parties to such judgment, their executors or administrators shall dwell and reside, or in which any valuable goods, credits, or estate of any debtor, in such judgment shall be found at the time of bringing such action: *Provided*, That such judgment shall be certified in the manner which is, or shall be prescribed by any general law of the Congress of the United States.

in what county or court.

[Ib. § 2.]

Judgment to be certified according to act of Congress.

In such action interest to be cast on damages and costs.

[Ib. § 3.]

[\*265] How executions are to be made returnable.

[See § 3, of next chapter.]

Clerks may grant summons for witnesses in civil cases.

Penalty for witness not obeying summons, on tender of fees.

Amount to be tendered.

**SECT. 36.** *Be it further enacted*, That in the action of debt, which shall be duly maintained upon any judgment as aforesaid, lawful interest (*k*) shall be allowed, as well upon the costs as upon the debt or damages, or the balance thereof due and recoverable, and judgment shall be rendered thereon accordingly.

**SECT. 37\*.** *Be it further enacted*, That all executions issued upon any judgment in civil causes, shall be made returnable at such times as are provided by the several laws of this State; and in all cases where a writ of execution shall issue, there shall be expressed therein the time and place when and where the same shall be returnable.

**SECT. 38.** *Be it further enacted*, That the Clerks of the several Courts within this State, may, and are hereby respectively empowered to grant summons for witnesses in civil causes, directed to the persons to be summoned. And if any person who shall be served with lawful process, or summons to testify, depose, or give evidence concerning any cause or matter depending in any of the Courts aforesaid, or before any Justice of the Peace, and who shall have a sum of money tendered to him which shall be equal to his legal fees for travel to the place where the Court is held, and one day's

Court rendering them, is put in issue, but not the merits. *Ib.*; *Jacobs vs. Hull*, 12 *Mass.* 25; *Com. vs. Green*, 17 *Mass.* 545.

3. *Hall & al. vs. Williams & al.* 6 *Pick.* 232.

4. A citizen of any other of the United States is not considered as a foreigner in this State, in any courts of law. *Barrell vs. Benjamin*, 15 *Mass.* 354.

(*k*) See note *c*, to ch. 19, ante, p. 104.

attendance, do not appear according to the tenor of the process or summons, having no reasonable let or impediment to the contrary, such person shall be liable to the action of the aggrieved party for all damages by him sustained by such default, and the Court or Justice of the Peace shall have power by attachment to bring such contemptuous witness into Court, or before him, and to fine him at discretion, not exceeding the sum of twenty dollars, and shall order him to pay the cost of such attachment.

SECT. 39. *Be it further enacted*, That when any person in whose favour a judgment is given at the Circuit Court of Common Pleas, shall appeal (l) therefrom, where an appeal is by law allowed, because the damages given are too small, he shall be entitled to a Jury at the Supreme Judicial Court to inquire into the damages, without any further notice to the appellee. And when in the Circuit Court of Common Pleas judgment shall be given either upon abatement or demurrer, the party against whom judgment is given, shall have the privilege of appealing, in case the action is appealable without any further proceedings had in the Circuit Court of Common Pleas. *And all agreements for waving pleas, and for amendments, and for making new (m) pleas at the Supreme Judicial Court made and entered upon the records of\* the Circuit Court of Common Pleas shall be binding on the parties throughout the whole process of the suit.*

SECT. 40. *Be it further enacted*, That where any person shall be feloniously stricken, poisoned or injured in one county in this State, and die of the same stroke, poisoning

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[Mass. Stat. Oct. 30, 1784, § 5, 6.]

Court may issue attachment against such witness.

Appeal allowed from C. C. Pleas to Sup. Judicial Court.

[See vol. 3, p. 13.]

[Mass. Stat. Oct. 30, 1784, § 8.]

Appeal may be from judgment on plea in abatement or demurrer.

[Part in italics repealed; see ch. 347, § 4, vol. 3, p. 194, and ch. 444, § 2, vol. 3, p. 286.]

[\*206]

Indictment to be found in the county where death happened.

(l) 1. An appeal lies to this court, from the C. C. Pleas, although they arrest judgment after verdict. *Bemis vs. Faxon*, 2 Mass 141.

2. If the court below arrest the judgment, or send the parties out of court without giving any judgment, in cases where an appeal lies, the aggrieved party may claim an appeal and the S. J. Court will sustain it, although the court below disallow it. *Lamphear vs. Lamprey*, 4 Mass. 107.

3. *Purple vs. Clark & al.* 5 Pick. 206.

(m) 1. The new plea must be filed at the first term of the Supreme Court. *Tyng vs. Prentice*, 3 Mass. 299.

2. Such new plea must be to the country. *Moody & al. vs. Blake*, 6 Mass. 459.

## CH. 59.

ed, though  
mortal wound  
were given in  
another coun-  
ty.

[Mass. Stat.  
Feb. 15, 1796,  
§ 1.]

So if mortal  
wound were  
given on high  
seas.

[Ib. § 2.]

Proceedings  
when a person  
indicted stands  
mute.

[Ib. § 3.]

If the accused  
be acquitted of  
part of felony  
charged and  
convicted of  
residue,

or injury in another county thereof; that then an indictment thereof, found by the Grand Jurors of the county where the death shall happen, before the Justices of the Supreme Judicial Court there held, shall be as good and effectual in law as if the stroke had been given, or poisoning, or injury done in the same county where the party shall die, or where the said indictment shall be found (n).

SECT. 41. *Be it further enacted*, That where any person shall be feloniously stricken, poisoned or injured, on the high seas and without the limits of this State, and die of the same stroke, poisoning or injury, in any county thereof, that then an indictment thereof found by the Grand Jurors of the county where the death shall happen before the Justices of the Supreme Judicial Court there held, shall be as good and effectual in law as if the stroke had been given, or poisoning or injury done in the same county where the party shall die.

SECT. 42. *Be it further enacted*, That if any person shall be indicted of any offence against this State for which the punishment is or shall be declared to be death, and shall stand mute, or refuse to plead, the Court shall proceed to the trial of the person so standing mute in the same manner as if he or she had pleaded not guilty, and shall render judgment accordingly (o). And no person who shall be indicted for any such offence, shall be allowed to challenge peremptorily above the number of twenty persons of the Jury.

SECT. 43. *Be it further enacted*, That when any person indicted of any felony, shall be by the verdict of the Jury of trials upon such indictment acquitted from part of such indictment, and convicted of the residue thereof, any such verdict may be accepted and recorded in the Court where such

(n) *Com. vs. Parker & al.* 2 Pick. 550. *Constitution of Maine*, ante, p. 19, § 6.

(o) 1. Where one indicted for a larceny stood mute upon his arraignment, a jury was empannelled, who returned their verdict, that he stood mute fraudulently, wilfully and obstinately; whereupon he was sentenced as upon a conviction. *Com. vs. Moore*, 9 Mass. 402.

2. In capital trials the prisoner may give his general character in evidence, after which the prosecutor may call witnesses to disprove such testimony. *Com. vs. Hurdy*, 2 Mass. 317.

trial shall be ; and thereupon such person so indicted, may be adjudged to be guilty of the offence, if any, which shall appear to such Court to be substantially alleged in and by the residue of such indictment, if the same shall amount to\* a felony, and shall be sentenced and punished accordingly.

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what judgment Court may render.

[\*267]

SECT. 44. *Be it further enacted*, That any person who shall be held in prison upon suspicion of having committed a crime for which he may have sentence of death passed upon him, shall be bailed or discharged, if he is not indicted at the second term of the sitting of the Supreme Judicial Court in the county where the crime is alleged to have been committed, when there are two terms a year in such county. And in such counties as have but one Supreme Judicial Court in a year, the defendant shall be bailed or discharged, if he is not indicted at the first term : *Provided*, Such person shall have been held in prison for the space of six months next preceding the day of the sitting of the Court. And when any person shall be held in prison under indictment, he shall be tried or bailed at the first† term next after his indictment, if he demands the same, unless it shall appear to the Court that the witnesses, on behalf of the government, have either been enticed away or are detained by some inevitable accident from attending. And all persons under indictment for felony shall be bailed or tried at the second term after the bill shall be returned, if they demand it.

Persons in prison, on suspicion, to be bailed or discharged, unless.

[Mass. Stat. Mar. 16, 1785, § 13.]

Provided he has been in prison six months.

If in prison and indicted, to be tried or bailed at first term.

[†See addition, al act, § 1.]

Persons indicted to be tried or bailed at second term.

SECT. 45. *Be it further enacted*, That in all informations to be exhibited, and in all actions or suits to be commenced against any person or persons, on the behalf of any informer, or on the behalf of the State, and any informer for or concerning any offence committed or to be committed against any penal statute, the offence shall be laid and alleged to have been committed in the county where such offence was in truth committed and not elsewhere, and if the defendant, in any such information, action or suit, pleadeth that he owes nothing, or that he is not guilty, and the plaintiff or informer in such information, action or suit, upon evidence to the Jury that shall try such issue, shall not both prove the offence laid in the said information, action or suit, and that

Informations and actions on penal statutes, on behalf of informer, or State and informer—where to be brought and tried.

[Mass. Stat. June 19, 1783, § 2.]

CH. 60. the same offence was committed in that county, the issue shall be found for the defendant or defendants.

In such information or action defendant may plead general issue and give special matter in evidence.

[\*268]

[Ib. § 3.]

SECT. 46. *Be it further enacted*, That if any information, suit or action, shall be brought or exhibited against any person or persons for any offence committed against the form of\* any penal law, on behalf of any informer, or on behalf of the State and any informer, it shall be lawful for such defendants to plead the general issue, and give any special matter in evidence to the Jury, which shall be as available to him or them, as if he or they had sufficiently pleaded the same matter in bar, or discharge of such information, suit or action.

No person to be executed but by warrant from the Executive, &c.

[Mass. Stat. 1777, § 24.]

SECT. 47. *Be it further enacted*, That no person upon whom sentence or judgment of death shall be passed or given by the Justices of the Supreme Judicial Court, shall be executed in pursuance of such judgment, before the whole record of such proceedings or case be certified by the Clerk of the same Court, under the seal thereof to the Supreme Executive Authority of this State, nor until a warrant shall be issued by the said Supreme Executive Authority, under the great seal of this State, with a copy of the record thereunto annexed, directed to the Sheriff of the county wherein the trial of the person so convicted as aforesaid, was had, commanding the same Sheriff to cause execution to be done upon the person so convicted as aforesaid, in all things according to the judgment against him. And the Sheriff to whom such warrant shall be directed is hereby authorized and required to execute the same in due form of law. [Approved March 19, 1821.]

Additional Act, ch. 186, Vol. 3, p. 5.

## Chapter 60.

AN ACT respecting the Attachment of Property on Mesne Process, and directing the issuing, extending, and serving of Executions.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That all goods and



estate attached (a) upon mesne process for the security of the CH. 60.

(a) 1. The right of attaching property, as security for the judgment a plaintiff may finally recover, is a provision not known to the common law. *Lindsay vs. Larned*, 17 Mass. 196.

2. Property attached on mesne process may be sold with consent of parties, as on execution, by *ch. 508, vol. 3, p. 356*.

3. Estate holden by virtue of a bond to convey, is liable to attachment and may be sold in the same manner as an equity of redemption, by *ch. 431, vol. 3, p. 274*.

4. An actual entry, by the officer, on real estate, seems not to be necessary to constitute a valid attachment. *Crosby vs. Allyn*, 5 Gif. 453.

5. Nor need he enter a meeting house to attach a pew. *Perrin vs. Leavitt*, 13 Mass. 128.

6. To constitute an attachment of goods, the officer must have the actual possession and custody of them. *Lane & al. vs. Jackson*, 5 Mass. 163; *Watson & al. vs. Todd & al. ib.* 271.

7. Where an officer, who had attached personal property on an original writ delivered the same to a stranger, taking an accountable receipt for the same, a return by him of an attachment of such property in a second suit against the same person, without an actual seizure of it, does not bind the property. *Knap vs. Sprague*, 9 Mass. 258.

But in *Ludden vs. Leavitt*, 9 Mass. 104, and *Perley vs. Foster*, *ib.* 114, and *Warren vs. Leland*, *ib.* 265, the special property and constructive possession, seems to have been considered as remaining in the officer after the goods had been delivered over by him to the bailee; the bailee being considered as his servant. So in *Bond vs. Padelford*, 18 Mass. 394, and *Commonwealth vs. Morse*, 14 Mass. 217. And in *Brownell vs. Manchester*, 1 Pick. 232, where the goods attached were delivered to a bailee and afterwards came into the possession of the debtor, it was held, that the officer had such possession as to maintain trespass against him, who took them from the bailee and delivered them to the debtor. In *Lyman vs. Lyman*, 11 Mass. 319, it was held, in an action against the bailee on his promise to deliver the goods attached, that it was not competent for him, or the debtor, to object to the validity of the attachment for want of actual seizure or possession of the goods by the officer. And in *Whittier vs. Smith*, 11 Mass. 311, in a like action where goods attached had been delivered to the bailee, and before the return day, were demanded to be taken on another suit; and afterwards the first suit was abandoned, and another instituted by the same plaintiff, whereon the goods were attached and sold on execution, which issued on the judgment in that suit; held that these facts furnished no defence to the suit. So in *Jewett vs. Tony*, 11 Mass. 219, it was held in a like action that the bailee could not object to the want of seizin or possession by the officer. The only ground, upon which the case of *Knap vs. Sprague* can be supported is that stated in *Cooper vs. Morey & al* 16 Mass. 5, viz. that "the officer has no action against the *receptors*, if he made no demand of the chattels

CH. 60. debt or damages sued for, shall be held for the space of

within thirty days after the judgment; where the goods shall have been in the possession of the debtor." But such demand has been held not to be necessary, where the debtor has sent the property out of the Commonwealth, or where a demand would have been nugatory. *Webster vs. Coffin*, 14 Mass. 196.

8. Where an officer attaches a debtor's cattle, the debtor is bound to support them, after notice to him by the officer that they are attached. If he neglects to do it, and they perish from that cause, the loss will be his. They are at his risk. And the officer who attaches them is answerable to the creditor for them; and his apprehension in incurring expense in their maintenance furnishes no excuse for his neglect. *Sewall & als. vs. Mattoon*, 9 Mass. 536.

9. Nor can the deputy in such case shew in mitigation of damages, that the expense of keeping the cattle between the attachment and the execution would have exceeded the value of the cattle. *Tyler vs. Elmer*, 12 Mass. 163.

10. The value of the cattle at the time the execution should have been levied, and not at the time of the attachment, forms the true measure of damages. *Ib.*

11. When chattels have been attached by a deputy sheriff, it is not in the power of another deputy of the same sheriff to make a second attachment of the same chattels; although the amount first attached is more than sufficient to secure the attaching creditor. *Vinton vs. Bradford*, 13 Mass. 114. See below, 13; also onward, § 20, 21.

12. In such case no overt act of the first deputy is necessary to constitute a second attachment. *Turner vs. Austin*, 16 Mass. 185.

13. Where a deputy sheriff attached goods, and within thirty days after judgment seized them in execution but failed to sell them; another deputy was justified in seizing them on another execution, in the hands of the bailee, notwithstanding he had notice of the first seizure. *Warren vs. Leland*, 9 Mass. 265; *Gibbs vs. Chase*, 10 Mass. 129.

14. If a deputy sheriff has attached goods on mesne process, and after judgment has been recorded for the plaintiff, and execution has issued, the latter require the deputy to deliver the goods attached to him, so that he may procure his execution to be levied upon them, the deputy is not bound to deliver them, he being alike accountable to the debtor for them as to the creditor, until sold on execution. *Blake vs. Shaw*, 7 Mass. 506.

15. Goods attached on mesne process may be lawfully sold by the sheriff on execution, the judgment debtor dying insolvent after the judgment and before the sale. *Grosvenor vs. Gould*, 9 Mass. 211; See § 32, of this chapter, and notes thereto.

16. But when there was no attachment on the mesne process, and the sheriff had not begun to execute the execution, the debtor having died after the issuing the execution, the sheriff cannot seize goods thereon after such death. *Jewett vs. Smith*, 12 Mass. 309.

17. Where two creditors caused the same land of the debtor to be attach-

thirty days after final judgment (b), to be taken in execution; and if the creditor shall not take them in execution within thirty days after judgment, the attachment (c) shall be void (d). And the share or shares, or interest of any person in any turnpike, bridge, canal or other company which heretofore has been, or hereafter may be incorporated, with all the rights\* and privileges appertaining to such shares, may be attached on mesne process, and taken on execution; and the attachment of such shares or interest on mesne process

CH. 60.

Attachment to hold for 30 days after judgment. [Mass. Stat. Oct. 30, 1784, § 11.] Attachment of shares in companies to bind the same and growing dividends.

[\*269]

ed at the same time, and their several executions to be duly levied within thirty days after judgment, each was adjudged to take a moiety of the land so attached and levied upon. *Shove vs. Dow*, 13 Mass. 529.

(b) 1. Judgment is presumed to be entered on the last day of the term, unless on notice it be in fact entered previously, in which case the time is minuted; and the "thirty days" are to be reckoned accordingly. *Herring & al. vs. Polley*, 8 Mass. 113.

2. The day after the last day of the term is the first day of the thirty. *Portland Bank vs. Maine Bank*, 11 Mass. 204.

3. Where the "thirty days" expire on Sunday, the lien does not extend into the following day. *Alderman vs. Phelps*, 15 Mass. 225.

4. If land attached on mesne process be seized on execution within thirty days from the judgment, it is sufficient although the proceedings on the execution are not completed until after thirty days have expired; and in such case the officer may date his return as of the day of the seizure, to which day all the after proceedings have relation. *Heywood vs. Hildreth*, 9 Mass. 393. See onward, note j 2.

5. See note to § 8, ch. 67, in this volume.

(c) In real actions, no lien can be created by attachment. The provision of § 1, does not extend to real actions. *Holmes vs. Fernald*, 7 Glf. 232.

(d) 1. The sheriff cannot retain goods attached on mesne process, after judgment is rendered for the defendant on an appeal, although the plaintiff reviews the action. *Clap vs. Bell*, 4 Mass. 99.

2. The submission of an action, and all demands existing between the parties, to the determination of referees, dissolves any attachment of property made in that action; and this whether other demands are in fact exhibited to the referees or not. *Mooney & ux. vs. Kavanagh & al.* 4 Glf. 277.

3. So where in an action of assumpsit a settlement of all accounts was made by the parties and judgment rendered for the plaintiff on the balance due him, which included some demands for which there was no proper count in the writ, it was held that the lien created by his attachment was thereby dissolved in toto, so far as the rights of subsequent attaching creditors were concerned. *Clark vs. Foxcroft*, 7 Glf. 348.

CH. 60. shall hold the same, and also all dividends growing due after such attachment, to respond the final judgment which may be rendered thereon, until the expiration of thirty days after the rendition of such judgment. And when any such shares

[Mass. Stat.  
Mar. 8, 1803,  
§ 1, 2.]

When attached or taken on execution, copies to be left with Clerk, &c.

Rights in equity liable to attachment and execution.

In case of redemption, attaching creditor to have lien on the fee of the estate.

Franchises of turnpikes, &c. may be attached.

Copy to be left with Clerk, &c. 30 days before Court.

Execution may issue 24 hours

or interest shall be attached on mesne process, or taken on execution without such previous attachment, an attested copy or copies of such writ of attachment or execution, shall, by the officer holding the same be left with the Clerk, Treasurer or Cashier of such company. And all rights in equity of redeeming lands mortgaged, reversions or the remainders, shall be liable to attachment upon mesne process and to be taken by execution upon judgment recovered for the payment of the just debts of the mortgager or owner; and when any right in equity of redeeming real estate which is mortgaged, shall be attached on mesne process, and pending the attachment such mortgaged real estate shall be redeemed by the mortgager, the attaching creditor shall have the same lien on such estate as though the attachment had been of the fee, and execution may be levied thereon accordingly.

SECT. 2. *Be it further enacted*, That the franchise and all the rights, privileges and immunities of any turnpike, bridge, canal or other company incorporated by law with power to receive toll so far as relates to the right of demanding and receiving toll, as well as all other corporate property, either real or personal, shall be liable to attachment on mesne process; and when such attachment shall be made or other service of a mesne process shall be made on any of the corporations aforesaid, the officer serving the same shall leave an attested copy of said process, and his return thereon with the Clerk, Treasurer, or some one of the directors of said corporation, thirty (e) days at least before the day (f) of the sitting of the Court to which the same may be returnable.

SECT. 3. *Be it further enacted*, That the party obtaining judgment in a civil action, in any Court of Judicature within

(e) Bullard vs. Nantucket Bank, 5 Mass. 100.

(f) Meaning the first day of the term. *Anon. 5 Mass. 198.*

this State, shall be entitled to have his execution (g) thereon at\* any time after the expiration of twenty-four (h) hours after judgment rendered, and within one year next after the entering up of such judgment: *Provided*, That there be no appeal granted. And execution issuing from the Circuit Court of Common Pleas, shall be made returnable (i) within three months, unless the Circuit Court of Common Pleas shall sit within that time, and in that case it shall be made returnable to the next (j) Court; and those issuing from the Supreme Judicial Court, shall be made returnable at the end of six months, unless the Supreme Judicial Court shall sit in the said county within that time, and in that case it shall be returnable to the same; and those issuing from a Justice of the Peace shall be made returnable within sixty days from the day of issuing them; and when such executions shall be returned without any satisfaction made, or satisfied only in part, the Clerk of the Court from whence, or Justice from whom such execution issued, shall, upon application of

CH. 60.

after judgment,  
if no appeal.  
[\*270]  
[Mass. Stat.  
Mar. 17, 1784,  
§ 1.]  
Executions  
when returna-  
ble.

(g) 1. An irregularity in issuing an execution does not make it void. *Ranlet vs. Warren*, 7 Mass. 478; *Young vs. Hosmer*, 11 Mass. 89.

2. Where one of two or more judgment creditors die after judgment and before execution issues, the execution ought regularly to issue in the name of all the creditors; but if it issue in the name of the survivor only, it is not therefore void. *Hamilton vs. Lyman*, 9 Mass. 15.

(h) A Justice of the Peace who issued an execution in two or three hours after he had rendered judgment, was holden liable to the party against whom such execution issued, and who was imprisoned thereon, in an action of trespass. *Briggs vs. Wardwell*, 10 Mass. 356.

(i) Bail were holden, notwithstanding the execution was made returnable at an earlier day than it should have been. *Ranlet vs. Warren*, 7 Mass. 477.

(j) 1. After the time when an execution is to be returned, it cannot be executed by taking the body, goods or estate of the debtor. When it is returnable in three months, it may be executed on the last day of these months. When returnable to a court to be holden at a certain day, it may be executed at any time on that day, while the court is setting, but not after the court is adjourned to the next day. *Prescott vs. Wright*, 6 Mass. 22.

2. But if the officer has begun to execute it at any time before it is returnable, he may complete the service after it is returnable, and retain the execution to endorse the service thereon; the whole of which will have relation to the time when it commenced. *Ib.* See ante, note c. 4.

**CH. 60.** the creditor, make out an alias (*k*), or pluries execution for the whole, or the remainder, as the case, may be, till the judgment shall be fully satisfied : but if the party shall neglect for the space of one year next after obtaining judgment, to take out his execution, or shall not within one year next after his execution shall be returned not satisfied, take out his alias or pluries, he shall sue out his writ of scire facias (*l*) against the adverse party, to show cause, if any he hath, why execution ought not to be done ; and upon his not showing sufficient cause, the Court shall award execution, for what remaineth, with additional costs : or the creditor may bring his action of debt on the judgment.

Not to issue after a year without a scire facias,

or may have action of debt on the judgment.

Officers to offset executions,  
[Mass. Stat. Feb. 26, 1811].

**SECT. 4.** *Be it further enacted,* That whenever it shall happen that any sheriff, coroner or other officer authorized by law to serve executions, shall at the same time have several executions wherein the creditor in one execution is debtor in the other, any such officer is hereby empowered and directed to cause one execution to answer (*m*) and satisfy

(*k*) 1. Justices of the Peace may renew executions and make copies after the expiration of their commissions, by ch. 441, vol. 3, p. 284.

2. Where bail has surrendered the principal upon *scire facias*, and he is committed, the plaintiff is entitled to an *alias* execution on which to charge the principal, although more than a year has elapsed since the return of the former execution. *Bartlett vs. Falley*, 5 Mass. 373.

(*l*) 1. Persons and property are made liable to attachment on *scire facias*, by ch. 463, § 2, vol. 3, p. 304.

2. Mistakes in levying executions upon lands not belonging to the debtor may be corrected on *scire facias* under provisions of ch. 216, vol. 3, p. 41 ; [Mass. Stat. June 14, 1785. See *Kendrick vs. Wentworth*, 14 Mass. 57 ; *Gooch, ex. vs. Atkins*, 14 Mass. 380 ; *Greene, adm. vs. Hatch*, 12 Mass. 195.]

(*m*) 1. No regard is paid to the origin or nature of the demands ; whether they arise *ex maleficio* or *ex contractu*, they are reduced to the same level by the respective judgments, and will mutually compensate each other. *Jarvis, adm. vs. Rogers*, 15 Mass. 406.

2. *Goodenow vs. Buttrick*, 7 Mass. 140.

3. The Supreme Court will set off a smaller judgment against a larger between the same parties, although the smaller judgment is on a demand which had been assigned, the assignee having previous notice of the demand on which the larger judgment was founded. *Greene, adm. vs. Hatch*, 12 Mass. 195.

the other, so far as the same will extend : *Provided always*, CH. 60.  
 That this act shall not be construed to extend to any judgments or executions wherein the creditor in one execution is not in the same capacity and trust, debtor in the other : *And provided also*, That nothing in this act shall be construed\* to affect or discharge the lien (n) which any attorney has or may have upon any judgments or executions for his fees and disbursements, or to affect the rights of any person to whom or for whose benefit the same judgments or executions, or the original cause of action thereof may have been assigned, bona fide, and without fraud.

provided parties are in the same capacity,

[\*271]

and that attorney's lien for costs, and assignees' rights shall not be impaired.

SECT. 5. *Be it further enacted*, That when any goods or chattels (o) shall be taken to satisfy an execution issuing upon a judgment obtained, such goods or chattels shall be safely kept, by the officer, at the expense of the debtor, for the space of four days next after they are so taken ; and within that time, the owner shall not redeem the same by otherwise satisfying the execution, such goods and chattels shall

Goods seized on execution to be kept 4 days before sale—

[Mass. Stat. Mar. 17, 1784, § 5.]

4. Whether, where the creditor in one execution is joint debtor with others in another, the officer, having both in his hands, is bound to make an offset, is doubted. *Gould vs. Parlen*, 7 Glf. 82.

5. Where upon application to the court to offset judgments the court refused after a full hearing, the officer holding the two executions issued upon such judgments is not liable to an action for refusing to set them off in the same manner. But it is otherwise, when the court should decline to interfere at all in the matter. *Ib.*

(n) 1. An attorney's lien on the cause for his fees does not exist till judgment is entered. *Potter, Judge, &c. vs. Mayo*, 3 Glf. 34.

2. The attorney's lien is upon the whole sum recovered. His receiving money of the debtor and paying it to the creditor, does not destroy his lien. *Baker vs. Cook*, 11 Mass. 238.

3. The court will not permit one judgment to be set off against another between the same parties, where it appears that persons other than the nominal creditors are interested by assignment of the demand on which one of the judgments is rendered. *Makepeace vs. Coates*, 8 Mass. 451.

4. In case of set off on executions, the fees in the two cross executions, upon which there is an attorney's lien, cannot be offset. *Dunklee vs. Locke*, 13 Mass. 525.

(o) A term in real estate for any number of years is a chattel, and may be sold on execution as other chattels. *Gay, adm.* 5 Mass. 419; *Chapman vs. Gray*, 15 Mass. 445. See onward, § 19.

CH. 60. be sold at public vendue to the highest bidder (*p*), having first been advertised (*q*) by the posting up notifications of the time and place of sale, forty-eight hours before the expiration of the four (*r*) days in the town or place where the sale is to be; and the money arising upon such sale shall be applied to the paying charges and the satisfying the execution, and the officer shall return the overplus, (if any there be) to the debtor (*s*). And the officer who is possessed of the execution shall make return (*t*) of the same with his doings therein, par-

to be advertised  
48 hours  
before sale—

officer to make  
particular re-  
turn—

(*p*) If the highest bidder refuses to take and pay for the article he has bid off, the officer may set it up again and sell it to the highest bidder at such second attempt. *Wilson vs. Loring*, 7 Mass. 392.

(*q*) 1. If the goods are sold without being legally advertised, the sheriff is liable in an action of the case for a false return; but not in an action of trover brought by the judgment debtor. *Livermore vs. Bagley*, 8 Mass. 487.

2. The return of service by an officer cannot be falsified by the defendant, whose remedy is by an action for false return against the officer. *Slayton vs. Chester*, 4 Mass. 479; See *Whitaker vs. Sumner*, 9 Pick. 308.

3. A sheriff, or his deputy cannot, either in pleading or by evidence, falsify his own return. *Gardner vs. Hosmer*, 6 Mass. 327; *Purrrington vs. Loring*, 7 Mass. 392. See *Boynton vs. Willard*, 10 Pick. 166.

(*r*) The officer is bound to sell at the expiration of four days after seizure; and if he neglects to do so, another creditor may seize the goods and cause them to be sold for his benefit. *Caldwell vs. Eaton*, 5 Mass. 399.

(*s*) A judgment debtor, whose goods have been seized and sold on execution, does not stand in the relation of vendor to the purchaser, and is a competent witness in any suit between other persons respecting the goods. *Lothrop vs. Muzzys Glf.* 450.

(*t*) 1. It is necessary to valid title to goods purchased at a sheriff's sale on execution, that the sheriff make a due and legal return of the execution. *Hammatt vs. Wyman & Co* 9 Mass. 139. Yet—

2. In *Ladd vs. Blunt*, 4 Mass. 402, Parsons, C. J. seems to have considered a sale of goods upon execution as valid, even in case the officer should neglect to make any return upon the execution. And in *Howe vs. Starkweather*, 17 Mass. 243, Parker, C. J. on the authority of *Titcomb vs. The Union M. & F. Ins. Co.* 8 Mass. 335, said "Generally a purchaser of chattels at a sheriff's sale having received the goods and paid for them, would have the property notwithstanding any irregularity of the officer making the sale. Purchases would not be made and the interests of debtor and creditor would suffer, if sales made by one having lawful authority and appearing to have exercised it lawfully should be avoided on account of some irregularity, which could not be known at the time." But he added "even in such cases,



ticularly describing the goods taken and sold, and the sum for which each article was struck off.; and if any officer shall be guilty of any fraud in the sale or in the return, he shall be liable to the debtor to pay him five times the sum defrauded, to be recovered by action of the case.

CH. 60.

penalty for  
fraud therein.

SECT. 6. *Be it further enacted*, That an attested copy or copies of the execution left with the Clerk, Treasurer or Cashier of any turnpike, bridge, canal or other corporation, and an advertisement of the time and place of sale being once published within said thirty days after judgment, shall be deemed a taking such shares or interests in execution, pursuant to the attachment on the original writ; and so many of said shares, or so much of said interest may be sold on said execution at public vendue to the highest bidder as shall be sufficient to satisfy the same, and the charges of the sale, after notice shall have been given of the time and place of sale in manner as hereinafter provided; and in case the officer making\* the sale, or the purchaser or purchasers of any such shares or interest do cause an attested copy or copies of such execution, and the officer's return thereon to be left with such Clerk, Treasurer or Cashier, within fourteen days after the sale is completed, and pay for the recording of the same, such purchaser or purchasers shall be thereby entitled to such shares and interest, with all the privileges appertaining thereto, and the income and dividend which may have accrued or been made on the same subsequent to the attachment thereof on mesne process; and it shall be the duty of the proper officer or officers of such corporation, to issue to the purchaser or purchasers under such execution, such certificates as by the bye-laws and regulations of such corporation

Leaving copy of execution with certain officers of corporations to be a taking on execution.  
[Mass. Stat. Mar. 8, 1806, § 1, 2.]  
Shares, &c. to be sold at auction, after notice.

[\*272]  
Copy of return to be left with officer of corporation.

Certificates of shares to be given to purchaser.

however, the return of the officer ought to shew a compliance with the law, or the purchaser would be unable to maintain his property." Why would not as great or even greater inconvenience and mischief result from holding all sales to be a nullity where the officer should neglect to make a return in due form upon the execution? In *Ingersol vs. Sawyer*, 2 Pick. 276, the court express a doubt whether even in the case of a sale of an equity of redemption, the purchaser might not maintain a title under the sale even without any return whatever. See onward, note a, § 17, p. 342.

**CH. 60.** are the evidences of the shares or interest of a proprietor in such corporation (u).

Mode of notifying sale of shares.

[Ib. § 3.]

**SECT. 7.** *Be it further enacted,* That in making sale of any such shares or interest, the officer holding the execution shall give notice in writing of the time and place of sale to the judgment debtor, by leaving the same at his last and usual place of abode, if within the county in which the said officer dwells, and public notice of the said time and place of sale, by posting up notifications thereof in one or more public places in the town or plantation where such sale is to be made, and also in one or more public places in the two adjoining towns, thirty days at least before the time of sale, and further shall cause an advertisement expressing the time and place of sale, and against whom such execution shall have issued on which such shares or interests have been taken, to be published three weeks successively before the day of sale, in some public newspaper printed in the county where the sale is to be made, if any such be therein printed, and in case no such paper is therein printed, then such advertisement shall be published in some public newspaper in the nearest county wherein a newspaper shall be published; and in case the judgment debtor has at no time resided, or does not then dwell in such county, the posting up such notifications, and publishing such advertisements in manner aforesaid shall be deemed sufficient notice of such sale; and in case the shares or interest so notified for sale, shall not for want of purchasers, be disposed of at the time appointed\* for sale, the officer shall adjourn the sale for a time not exceeding three days, and from time to time, until the sale shall be completed; and the surplus monies (if any there be) arising from such sale, beyond satisfying the contents of the execution and necessary intervening charges, the officer shall pay the debtor, or deposit the same with the treasurer or cashier of the corporation, for the benefit of the debtor and subject to his order.

[\*273]

Vendue may be adjourned for 3 days.

Surplus how to be disposed of.

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(u) These provisions apply to shares in a bank, where no mode is prescribed in the act incorporating such bank, for levying upon the shares. *Hussey vs. M. & M. Bank*, 10 Pick. 415.

**SECT. 8.** *Be it further enacted,* That whenever any officer, having a writ of attachment or execution against any person interested in any such company, shall exhibit to the Clerk or Cashier thereof, such writ or execution, and request a certificate from him of the number of shares or amount of interest owned by the debtor in such company, it shall be the duty of such Clerk or Cashier to give the said officer a certificate of the number of shares or amount of interest holden and owned by the debtor in such company, and therein express the numbers or other marks by which such shares or interest are distinguished; and in case such Clerk or Cashier shall refuse to make and deliver to the officer such certificate, or shall wilfully make and deliver a false certificate thereof, such Clerk or Cashier shall be liable to pay to the creditor the full contents of such execution, and the contents of the judgment which may be recovered by the plaintiff in such writ of attachment, and the same may be recovered by the judgment creditor in an action of debt, in any Court proper to try the same.

CH. 60.

Clerk or cashier on request of officer, to give him certificate of shares owned by the debtor.

[Ib. § 4.]

Penalty for neglect, &c.

**SECT. 9.** *Be it further enacted,* That whenever any judgment has been, or may hereafter be recovered in any Court of Law against any turnpike, bridge, canal or other (v) company incorporated by law, with power to receive toll, the franchise of such corporation, with all the privileges and immunities thereof, so far as relates to the right of demanding and receiving toll, as well as all other corporate property, whether real or personal, shall be liable to the satisfaction and payment of such judgment, and may be taken and sold on execution at public vendue; the officer first giving notice of the time and place of sale, by posting up a notification thereof in any town or plantation, in which the Clerk, Treasurer or any of the Directors of said corporation may\* dwell, thirty days at least before the time of sale, and also by causing an advertisement, expressing the name of the creditor, the amount of said execution, and the time and place of sale, to be inserted three weeks successively in some public newspaper, published in any county in which


Franchise of corporation after notice, may be sold on execution.

[Mass. Stat. Feb. 28, 1811, § 1.]

Mode of giving notice.

[\*274]

(v) *Titcomb vs. M. & F. I. Company*, 8 Mass. 333.

CH. 60.  either of the aforesaid officers of said corporation may dwell (if any such newspaper shall be there printed) the last publication to be at least four days before the day of sale.

Mode and effect of such sale.

[Ib. § 2.]

Officer may give possession to purchaser.

Corporation may redeem within three months—

on what terms.

[\*275]

Warrant of distress may

SECT. 10. *Be it further enacted*, That in the sale of such franchise any person who will pay and satisfy said execution and all legal fees and expenses thereon, in consideration of being entitled to receive, to his own use, for the shortest period of time, all such toll as the said corporation may by law be entitled to demand and receive, shall be considered as the highest bidder, and the same shall be struck off to him accordingly ; and the officer's return on said execution shall transfer to the purchaser all the privileges and immunities which by law belonged and appertained to said corporation, so far as relates to the right of demanding and receiving toll ; and the said officer shall immediately after such sale, be authorized and empowered to deliver to said purchaser, possession of all the toll houses and gates belonging to said corporation, in whatever county the same be situated ; and the said purchaser shall thereupon be entitled to demand and receive to his own use, all the toll which may accrue, within the time limited by the term of his purchase, in the same manner, and under the same regulations, as the said corporation was before authorized to demand and receive the same : *Provided however*, That the said corporation shall in all other respects, retain the same powers, be bound to the discharge of the same duties, and liable to the same penalties and forfeitures as before belonged to and were required of them by law ; and *provided also*, That if the said corporation shall, at any time within three months from the time of such sale, pay over or tender to said purchaser such sums of money as he may have paid in satisfaction of said execution with twelve per cent. interest thereon, in addition to the toll which he may have received, then the said franchise, and all the rights, privileges and immunities thereof, shall revert to said corporation, and shall in all\* respects belong and appertain to them, as if the same had not been sold as aforesaid.

SECT. 11. *Be it further enacted*, That whenever any damages have been, or may hereafter be assessed to any per-

son or body politic, either by the report of a committee, or the verdict of a Jury, for any injury sustained in his or their property, by the doing of any of the corporations aforesaid, and the said damages shall remain unpaid for the space of thirty days after the final acceptance of such report or verdict, such person or body politic, upon petition to any Court, by which such report or verdict was accepted, shall be entitled to a warrant of distress against said corporation, for the damages so assessed and the interest thereon, together with his or their reasonable costs; and the officers to whom such warrant of distress may be delivered, may proceed to execute the same in the same manner as is herein before provided for the levying and satisfaction of executions.

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be issued against corporation for damages assessed by committee or Jury—

[Ib. § 4.]

to be served as executions.

SECT. 12. *Be it further enacted*, That the officer who may levy any execution or warrant of distress by virtue of the ninth, tenth, eleventh and thirteenth sections of this act, shall be authorized to adjourn the vendue from time to time, not exceeding ten days at any one time, until the sale shall be completed.

In certain cases vendue may be adjourned 10 days.

[Ib. § 5.]

SECT. 13. [Repealed by re-enactment, with slight variation, by ch. 519, § 19, and 39, vol. 3, pp. 384 and 394.]

SECT. 14\*. [Repealed (*w*), in same manner with preceding section.]

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SECT. 15. [Repealed (*w*), in same manner with preceding sections.]

SECT. 16. [Repealed, in same manner with preceding sections\*.]

[\*277]

SECT. 17. *Be it further enacted* (*x*), That all rights in equity of redeeming real estate mortgaged, shall be liable to be taken in execution upon judgment for the payment of the just debts of the mortgager or owner, and the officer having such execution is hereby authorised to make sale of the same

Equities of redemption may be sold on execution.

[Mass. Stat. Mar. 1, 1799. § 3, 4.]

(*w*) The cases provided for in § 14, 15, are in which the bank is *mortgagee* or *assignee* of a mortgage, and the debt secured is due at the time of seizure and sale. *Vose vs. Handy*, 2 *Gl.* 332.

(*x*) 1. The act of March 4, 1833, ch. 87, provides for the attachment on *moane* process, and sale on execution of a debtor's right of redeeming an equity that has been sold on a previous execution, and also his right of redeeming real estate set off on execution.

2. When an equity of redemption is attached on the writ, it is the duty of the officer, upon receiving the execution within thirty days after the judgment, to levy on the equity, without waiting for particular instructions from the creditor. It is otherwise, where the land itself is attached. *Start vs. Sherwin*, 1 *Pick.* 521.

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Mode of giving  
notice.

Attachment to  
hold until sale.

Auction may  
be adjourned  
3 days.

at public vendue, and to make, execute, acknowledge and deliver to the highest bidder good and sufficient deed or deeds of any estate so sold (*y*), in manner as is hereinafter expressed. And the officer shall give notice in writing, of the time and place (*z*) of sale to the debtor in person, or by leaving the same at his last and usual place of abode, and public notice of the said time and place of sale, by posting up notifications thereof in two (*a*) or more public places in the town or plantation in which such mortgaged estate is situated, and also in one or more public places in two adjoining towns, thirty days at least before the time of sale; and further shall cause an advertisement of the time and place of sale to be published three weeks successively before the day of sale in some public newspaper printed in the county in which such real estate lies, if any such newspaper shall be there printed, and the notifications aforesaid, being given or posted up within the space of thirty days after judgment given whereon such execution shall issue, the attachment shall hold the equity, attached as aforesaid, until the levy of such execution can be completed in manner hereinafter described. And in case the estate notified for sale as aforesaid, shall not be disposed of at the time and place appointed, the officer shall adjourn the vendue, not exceeding three (*b*) days,

(*y*) 1. The purchaser of an equity obtains by such sale a legal seizin of the premises, and may maintain a real action against any stranger, unless such stranger had in fact disseized the mortgagor before the sale of the equity. *Wellington vs. Gale*, 7 Mass. 138.

2. So the sale gives him a right of action for the land against the mortgagor himself, after payment or tender of the money due on the mortgage. *Porter vs. Millet*, 9 Mass. 102. See onward, note *d*, 1.

(*z*) *Whitaker vs. Sumner*, 9 Pick. 308; *Atkins & al. vs. Sawyer*, 1 Pick. 351.

(*a*) 1. If the land lies in more towns than one, it is necessary that the officer should post up two notifications in every town where any part of the land is situated. *Grosvener vs. Little*, 7 Glf. 376.

2. A general return by an officer upon an execution, that, after advertising as the law directs, he had sold the debtor's right, &c. was holden insufficient to pass such right to the purchaser. *Davis vs. Maynard*, 9 Mass. 242; *Wellington vs. Gale*, 13 Mass. 488. See ante, note *t*, 2.

(*b*) Sunday is not to be reckoned as one of the three. *Thayer vs. Felt*, 4 Pick. 354.

and so from time to time until the sale shall be completed. **CH. 60.**  
 And the surplus monies (if any there shall be) arising from such sale, beyond satisfying the debt, costs and necessary intervening charges, the officer shall return to the debtor (c). Disposal of surplus.

**SECT. 18\*.** *Be it further enacted,* That all deeds made and executed as aforesaid, shall be as effectual, to all intents and purposes, to convey the debtor's right in equity aforesaid, to the purchaser (d), his heirs and assigns, as if the same had been made and executed by such debtor or debtors: *Provided,* That every such debtor shall have liberty to redeem the right in equity so sold, within one (e) year next after the time of executing the deed or deeds thereof, in manner aforesaid, by paying the sum† which may by such sale have been satisfied on such execution, with the interest thereof, deducting the rents and profits the purchaser or any under him may have received over and above the repairs and betterments made by the purchaser or any under him. [\*278]  
Deeds of officers to be effectual to pass the right.  
[Mass. Stat. Feb. 16, 1816, § 1.]  
Debtor may redeem within one year, paying, &c.  
[†And "legal costs;" See ch. 182, vol. 3, p. 3.]

**SECT. 19.** *Be it further enacted,* That the estate, right, title or interest of any person, owned, holden or claimed in virtue of a possession, or improvement as expressed in "An Act for the settlement of certain equitable claims arising in real actions‡," shall be liable to be taken by attachment, on Possessory titles to real estate may be attached and sold on execution.  
[†Ante, p. 201, ch. 47.]

(c) *Clark vs. Austin*, 2 Pick. 531; *Bacon vs. Leonard*, 4 Pick. 281.

(d) 1. The purchaser of an equity can aver no seizin or title against any other person than the execution debtor or his immediate tenants or assigns. *Forster vs. Mellen*, 10 Mass. 421.

2. A mere disseizor, in possession of lands when a right in equity to redeem the same is seized and sold upon execution, may avail himself of any insufficiency of the officer's return, in an action by the purchaser of the equity against such disseizor. *Wellington vs. Gale*, 13 Mass. 483.

(e) 1. The day on which the deed is executed, is excluded. *Bigelow vs. Wilson*, 1 Pick. 485.

2. Where the right in equity of redeeming lands was sold on execution by the sheriff, and the purchaser forthwith brought his action against the mortgagor to have possession of the lands; and afterwards, and within the year, the mortgagor tendered to the demandant the purchase-money and interest, pursuant to the statute, but did not offer to pay the costs of the suit,—it was holden that under the laws of this State the tender was no bar to the action, unless it included the costs also. *Jewett vs. Felker*, 2 Glf. 339.

3. But in such case, the Court, on payment of the money and costs, will stay further proceedings. *Id.*

CH. 60. mesne process, and by execution (*f*). And when any such right, title, interest or estate shall be seized and sold upon execution, such notice shall be given, and such proceedings had, in every respect, as are required by law, in the sale of an equity of redemption; and the debtor whose right, title, interest or estate, is so taken and sold, shall have the right of redeeming the same, within such time, and in such manner, as is provided in cases of sales of equity of redemption.

Redeemable in same manner as equities of redemption.

Surplus in officer's hands to be applied towards paying other executions in his hands.

[Mass. Stat. Mar. 8, 1806, § 6.]

{\*279}  
Or if such surplus be attached before sale, or taken on another execution, same to be held subject thereto.

SECT. 20. *Be it further enacted (g)*, That whenever an officer shall have in his hands any money arising from the sale of the shares or interest aforesaid, or from the sale of any equity of redemption, or personal property, more than sufficient to satisfy the execution or executions on which such shares or interests, equity of redemption, or personal property were taken and sold, such officer shall apply the same surplus money, or such part thereof as may be necessary to the payment of any other (*h*) execution which he may have in his hands, unsatisfied against the same debtor, or which may be delivered to him before he shall have paid over such surplus money, any thing in this or any other law of this State to the contrary notwithstanding: *Provided however*, That if such share or interest, equity of redemption, or personal\* property, shall, before such sale, have been attached on mesne process, other than that on which such execution shall have issued, or shall have been taken on some other execution, and the said officer is duly notified thereof, he shall hold such surplus monies, subject to such attachment or execution, and shall apply the same to the payment of the

(*f*) By ch. 431, vol. 3, p. 274, estate holden by virtue of a bond or contract in writing to convey, on conditions, is made attachable, and the obligor is compelled to disclose by bill in equity the sum actually due.

(*g*) 1. The provisions of § 20 must be confined to cases where different attachments of chattels had been made by the same officer, but at the suit of different creditors. *Watson & al, vs. Todd & al.* 5 Mass. 275.

2. In case of a sale of an equity of redemption upon execution, the officer is bound to pay over the surplus money arising from the sale, to another officer having an execution against the same debtor. *Id; Denny vs. Hamilton*, 16 Mass. 402, also, § 21, above.

(*h*) *Bacon vs. Leonard*, 4 Pick. 281.



execution which may issue on the judgment that may be rendered on such mesne process, and delivered to him within thirty days after the rendition of such judgment, or to the payment of the execution by which such shares or interest, equity of redemption, or personal property had been taken according to the priority in regard to time, of such attachment or taking in execution.

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SECT. 21. *Be it further enacted*, That whenever any Sheriff, or Deputy Sheriff shall make sale of any share or interest in an incorporated company, of any right in equity to redeem mortgaged real estate, or of any personal property, which shall before such sale, have been attached on mesne process, or taken on execution by a Coroner, and such Sheriff, or Deputy Sheriff is duly notified (i) thereof in writing, he shall hold the monies in his hands, arising from such sale, subject to such attachment or execution, in the same manner as if he were authorized to serve the execution which shall have issued, or may issue on such mesne process, or on which said share or interest, equity of redemption, or personal property, may have been taken by said Coroner.

If second attachment or seizure be made before sale, by a Coroner, Sheriff on notice thereof must hold surplus for him.

[Mass. Stat. Feb. 1, 1820, § 1.]

SECT. 22. *Be it further enacted*, That said Sheriff or Deputy Sheriff, after being notified in writing by said Coroner, of the execution in his the said Coroner's hands, on which said share or interest, equity of redemption, or personal property, shall have been taken, or which issued on the mesne process whereon said share or interest, equity of redemption, or personal property had been attached, of the time of such attachment on mesne process, or taking on execution, and of the whole amount, including fees due on said execution, shall pay over to the said Coroner the amount due on said execution, or so much thereof as shall remain in his hands, after satisfying all executions, in his own hands on which said share or interest, equity of redemption, or personal property had been taken, or which issued on mesne process\* whereon said share or interest, equity of redemption, or personal property had been attached prior to the

Sheriff, on notice to pay over such surplus to Coroner, &c.

[Ib. § 2.]

(\*220)

(i) See note g, 1, 2, to § 20.

CH. 60. time of the attachment on mesne process, or taking on execution as aforesaid, by said Coroner.

In similar cases coroner to hold and pay over surplus to a sheriff.

[Ib. § 3.]

SECT. 23. *Be it further enacted*, That whenever any Coroner shall make sale of such share or interest, equity of redemption, or personal property, which shall, before such sale, have been attached on mesne process or taken on execution by a Sheriff or Deputy Sheriff, such Coroner shall be subject to the same duties and requirements, in relation to such Sheriff or Deputy Sheriff, as by the twenty-first and twenty second sections of this act, a Sheriff, is, in like case subject to, in relation to a Coroner.

In similar cases, constable to hold and then pay over surplus to sheriff or coroner.

[Ib. § 4.]

SECT. 24. *Be it further enacted*, That whenever any Constable shall make sale of any such share or interest, equity of redemption, or personal property, which shall before such sale have been attached on mesne process, or taken on execution by a Sheriff or Deputy Sheriff, or by a Coroner, such Constable shall be subject to the same duties and requirements in relation to such Sheriff or Deputy Sheriff, or Coroner as by the twenty-first and twenty-second sections of this act, a Sheriff is, in like case subject to, in relation to a Coroner.

Shares held in companies to be attached and sold in no other manner than this act provides.  
[Mass. Stat. Mar. 8, 1805, § 5.]

SECT. 25. *Be it further enacted*, That the shares and interests held by any person or persons in any such company as aforesaid, may be attached on mesne process and taken and sold on execution, in the manner provided by this act, and no other, any thing in the act incorporating such company to the contrary notwithstanding (j).

In what counties certain proceedings may be had.

SECT. 26. *Be it further enacted*, That all proceedings under the authority of the second, ninth, tenth, eleventh and twelfth sections of this act, may be had in any county in which either the creditor, or the President, either of the Directors, the Treasurer, or Clerk of said corporation may reside or dwell.

Mode of levying executions on real estate.

SECT. 27. *Be it further enacted*, That when any person shall obtain judgment in any Court within this State, for any sum of money, and the person or persons against whom

(j) This provision is intended to have a retroactive operation. *Hove vs. Starkweather*, 17 Mass. 242.

the judgment is, does not satisfy such judgment, and the creditor can find no (k) personal estate to his acceptance, wherewith\* to satisfy his execution, and shall think proper to levy (l) his execution upon the debtor's real estate (m), then the officer to whom the execution is directed and delivered, shall cause three disinterested and discreet men, being freeholders in the county, one to be chosen by the creditor (n) or creditors, one by the debtor (o) or debtors, whose land is to be taken, if they see cause, and a third by the officer; and in case the debtor or debtors shall neglect or refuse to choose

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[\*281]

[Mass. Stat.  
Mar. 17, 1784,  
§ 2.]

(k) 1. Although the creditor may have attached on the original writ sufficient personal property wherewith to satisfy his execution, he may nevertheless levy on real estate of the debtor. *Herring & al. vs. Polley*, 8 Mass. 120.

2. In the return of an extent it is not necessary for the officer to certify that there was no personal estate belonging to the debtor, whereof the execution might have been satisfied. *Boylston vs. Carver*, 11 Mass. 515.

(l) A levy gives the creditor an actual seizin of the lands. *Wyman vs. Bridgen*, 4 Mass. 150.

(m) 1. An extent may well be of a chamber in a house or store, with a right of ingress and egress by an outer door, entry and staircase. *Buck vs. Hardy*, 6 Glf. 162. See onward, note v, 2.

2. Land mortgaged and not entered upon by the mortgager, is not real estate within the meaning of this provision, so as to be levied upon for a debt due from the mortgager. *Blanchard vs. Colburn, &c. ux.* 16 Mass. 347.

3. Iron stoves fixed to the brick work of chimnies of a house, will pass with the house on an extent of an execution thereon. *Goddard vs. Chase*, 7 Mass. 432.

4. Where the property set off is under lease, the rent will pass to the creditor as incident to the reversion. *Montague vs. Gay*, 17 Mass. 440.

5. The extent upon land conveys all the debtor's right in the buildings on the land, whether their foundations are sunk below the surface or not. *Waterhouse vs. Gibson & al.* 4 Glf. 230.

(n) 1. *Cutting & ux. vs. Rockwood*, 2 Pick. 448.

2. The return of the sheriff as to the qualification of the appraisers, cannot be questioned in a subsequent action upon the judgment. *Lawrence vs. Pond*, 17 Mass. 434.

3. Where the sheriff failed to certify in his return upon an execution, which he had extended, that the appraisers were discreet and disinterested freeholders, the extent was holden void. *Williams vs. Amory*, 14 Mass. 20.

(o) The guardian of a spendthrift who is the creditor, may choose an appraiser for his ward. *Bond vs. Bond*, 2 Pick. 382.

CH. 60. as aforesaid, after being duly notified (*p*) by the officer, if the debtor be living in the county (*q*) in which such land lies, the officer shall appoint one for such (*r*) debtor or debtors, to be sworn (*s*) before one of the Justices of the Peace of the same county, faithfully and impartially to appraise (*t*) such real estate as shall be shown to them, who shall appraise the same, to satisfy the same execution with all fees, and shall set (*u*)

(*p*) 1. Where a judgment debtor was out of the State at the time of the extent of an execution on his land, the appointment of an appraiser by his wife was holden valid. *Russell & al. vs. Hook*, 4 *Glif.* 372.

2. If one of two judgment debtors elect an appraiser to appraise land belonging to both, or to him only, it is sufficient; otherwise if the land belonging solely to the other debtor. *Herring vs. Polley*, 8 *Mass.* 113.

3. If the real estate to be extended upon lay in different parts of the county, different appraisers may be selected and employed. *Boylston vs. Carrer*, 11 *Mass.* 515. See onward, note *e*, p. 352.

4. In levying upon these several tracts of land belonging to the debtor it is not necessary that a several appraisement be made of each. *Barnard vs. Fisher*, 7 *Mass.* 71; *Bond vs. Bond*, 2 *Pick.* 382.

(*q*) 1. Six hours notice to the judgment debtor, of an extent about to be made, was held sufficient, he living within one quarter of a mile of the premises. *Buck vs. Hardy*, 6 *Glif.* 162.

2. It is essential to the validity of the return of an extent, that it should show that the debtor was duly notified to choose an appraiser. *Means & al. vs. Osgood*, 7 *Glif.* 146.

3. If the judgment debtor is not in the county, it is sufficient if the officer, who is about to extend an execution on his lands, should leave notice at his last and usual place of abode. But whether any notice in such case is necessary—*Quere.* *Buck vs. Hardy*, 6 *Glif.* 162. See above, note *p*, 1.

(*r*) When a sheriff returns upon an execution that he has appointed two of the appraisers of real estate to be levied upon he must also return that the debtor refused to choose one. *Eddy vs. Knap*, 2 *Mass.* 154; *Whitman vs. Tyler & als.* 8 *Mass.* 284.

(*s*) 1. Defects in the certificate of the Justice before whom appraisers were sworn, will be disregarded, if the return of the officer be regular. *Bamford vs. Melvin*, 7 *Glif.* 20.

2. Where the appraisers are justices of the peace, they may administer the oath to each other. *Barnard vs. Fisher*, 7 *Mass.* 71.

3. Or the oath may be administered by the judgment debtor, if he be a justice. *Ib.*

(*t*) If the appraisers view the land, without going upon it, it is sufficient. *Bond vs. Bond*, 2 *Pick.* 382. See *Hammatt vs. Barrett, Jr.* *ib.* 564.

(*u*) 1 The three appraisers must certify, or if two only certify, a sufficient

out such estate by metes and bounds, (v) and the officer shall deliver possession and seizin (w) thereof to the creditor or creditors, his or their attorney. And when the real estate of the debtor or debtors shall be held in joint (x) tenancy, in coparcenary or tenancy in common with the real estate of other

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reason must be given why the third did not. *Whitman vs. Tyler & als.* 8 Mass. 284 ; *Maffit vs. Jaquins & al.* 2 Pick. 331. Where the officer's return states that A. B. and C. were appraisers, and A. B. and D. were in fact the persons who acted as appraisers, and whose names are signed to the appraisal, the return is invalid. *Nye vs. Drake*, 9 Pick. 35. But in *Barrett vs. Porter*, 14 Mass. 143, it was holden, that where it appeared on the return of the officer, that three appraisers were appointed and sworn, and that all the three had acted in the appraisal ; although the certificate was subscribed by two only, and no reason given why the third did not subscribe, the return might be sustained.

2. The power of setting off the estate comprehends the power of giving access to it ; so where land of a debtor is set off, to which there is no access but over other lands of the debtor, the sheriff and appraisers may set off to the creditor, a right of passage over such other lands, either separately or with the debtor. *Taylor vs. Townsend*, 8 Mass. 411. See ante, m, 1.

(v) 1. In the return of such an extent, a reference to deeds upon record may be a sufficient description of the lands. *Boylston vs. Carver*, 11 Mass. 515. See *Carpenter & ux. vs. Sutton*, 7 Pick. 49.

2. A reference for a description of land levied upon, to an inventory of an estate, was held insufficient. *Tate & al. vs. Anderson*, 9 Mass. 92. See *McGregor & al. vs. Brown*, 5 Pick. 170.

(w) 1. A return of the sheriff that he delivered seizin and possession of the land taken, to the agent, instead of the attorney of the creditor, is sufficient. *Pratt & al. vs. Putnam*, 13 Mass. 361.

2. An attorney for such purpose need not be constituted by deed. *Id.*

3. The neglect of the creditor for a month after the seizure and appraisal, to receive seizin, was adjudged an unreasonable delay, and such laches on his part as amounted to a waiver of the previous lien obtained by the attachment. *Waterhouse vs. Waite*, 11 Mass. 210.

4. An execution duly levied on land of the debtor, and possession by the creditor, is a satisfaction of the judgment, although the same be not recorded in the registry of deeds within three months as required by statute. *McLellan vs. Whitney*, 15 Mass. 137.

(x) 1. A levy of an execution on an undivided half of the farm, as the property of A. is void. *Nye vs. Drake*, 9 Pick. 35.

2. When a creditor would extend his execution on lands owned by his debtor in common with others, he must levy on a part in common. *Hasty & ux. vs. Johnson*, 3 Giff. 288.

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Levy to be recorded in 3 months in the Registry of Deeds, and effect thereof.

persons, then the said officer may extend execution on such debtor or debtor's real estate held as aforesaid, or part thereof, describing the same with as much precision as the nature and situation thereof will admit of, and give the creditor or creditors, his or their attorney, seizin and possession of such debtor or debtor's real estate held as aforesaid, or part thereof, to hold in common with the said other persons; which execution being returned with the doings (y) thereon into the Clerk's office, and before such return into the Clerk's office or afterwards, and within three months (z), the same shall be recorded in the Registry of Deeds in the county where the

3. So if the debtor holds in severalty, the creditor must levy on a part in severalty. *Ib.*

4. An execution against one holding lands in joint tenancy or tenancy in common, cannot be extended on a part of the lands so holden, by metes and bounds. *Bartlett vs. Harlow*, 12 *Mass.* 348.

(y) 1. If in the return of an extent, the land be described with such certainty that there could be no mistake as to its location, it is enough. *Buck vs. Hardy*, 6 *Glif.* 162.

2. Parol evidence is inadmissible to vary or modify the return of an officer's extent. *Waterhouse vs. Gibson & al.* 4 *Glif.* 231.

3. If there are inherent defects in the return of an extent on land, or if the land is appraised at too high a price, the creditor may waive the extent at any time before acceptance of the land. *Gorham vs. Blass*, 2 *Glif.* 232.

4. But the creditor cannot waive the extent after acceptance of livery and seizin from the officer. *Ib.*

5. If the officer's return have no date, it will be presumed to refer to the date of the appraisement. *Ib.*

6. The time of returning into the Clerk's office an execution extended on land, is not material, if it has been recorded in the registry of deeds within three months after the extent. *Emerson vs. Towle*, 5 *Glif.* 197.

(z) 1. The extent must be recorded within three months to avoid a *bona fide* mesne conveyance of the land. *Whitman vs. Tyler & als.* 8 *Mass.* 284. See above, note w, 4; also, *McGregor & al. vs. Brown*, 5 *Pick.* 170.

2. The plaintiff's execution not being recorded, he can derive no title under it by virtue of this act. *Foster vs. Briggs*, 3 *Mass.* 319; *Ladd vs. Blunt*, 4 *Mass.* 402. See *Prescott vs. Potter & al.* 3 *Pick.* 331.

3. By ch. 309, vol. 3, p. 152, it is made the duty of the officer to cause the levy to be recorded by the register of deeds, within three months after such levy. [See *Tobey vs. Leonard*, 15 *Mass.* 200.]

land lies; shall make as good title (a) to such creditor or CH. 60.  
creditors, his or their heirs and assigns, as the debtor had  
therein ; saving always to widows their dower (b) in all lands  
taken from their husbands by execution.

SECT. 28. *Be it further enacted* (c), That when it so happens that the real estate extended upon cannot be divided and set out by metes and bounds as before prescribed, or by the description before mentioned, then execution shall be extended upon the rents of such real estate, and the officer shall give\* seizin thereof to the creditor or creditors, his or their attorney ; and also in case of extending execution on rents as aforesaid, shall cause the person in possession and improvement, to attorn and become tenant to such creditor or creditors, and to pay the rent to him or them accordingly ; and upon refusal thereof, to turn the person so refusing out of possession and give seizin and possession of the same to the creditor to hold and enjoy the same until it shall be redeemed, as by this act is provided : *Provided always*, That in such case it shall and may be lawful for any debtor or debtors, his or their executors, administrators or assigns, at any time before the debt with interest is fully satisfied, to tender and pay to the creditor or the tenant in possession under him, the full remainder of his debt, interest and charges, to be liquidated by three Justices of the Peace, and to recover the possession of the same, in manner provided in this act.

Execution may in certain cases be extended on rents and profits;

[Ib. § 3.]

[\*282]

Tenant to attorn.

Right of redemption.

SECT. 29. *Be it further enacted* (d), That whenever a

(a) The creditor may maintain a real action declaring on his own seizin, or trespass against the debtor he shall continue his possession after the levy, without the plaintiff's consent, or he may re-enter on him after the levy is completed. *Gore vs. Brazier*, 3 Mass. 523.

(b) The dower is to be proportioned to the value of the lands as they existed at the time of the set off. *Copp vs. McDugall*, 9 Mass. 8.

(c) 1. Property under lease is not within the provisions of this section. *Montague vs. Gay*, 17 Mass. 441.

2. The estate of a tenant by courtesy may be taken on execution and set off by metes and bounds, or the rents and profits thereof may be taken. *Roberts vs. Whiting*, 16 Mass. 404. 146

(d) We are not aware of any authority which one man has to covert the sole tenancy of another into a tenancy in common except in the case provided in § 29. *Hasty & ux. vs. Johnson*, 3 Glf. 288.

**CH. 60.** creditor in execution, shall think proper to extend and levy the same on any saw mill, grist mill, or other mill, factory, mill privilege, or other real estate, which cannot be divided without prejudice to, or spoiling the whole, and where the whole of such saw mill, grist mill, or other mill, factory, or mill privilege, or other real estate, is not necessary for the satisfying of such execution, the same may be extended and levied in manner before prescribed, upon the same, or upon any undivided part thereof, which shall be sufficient to satisfy such execution; and in case the estate is so situated that the same cannot be set off by metes and bounds, the return upon the execution shall describe the whole estate, with as much precision as the nature of the case will admit; which execution being returned and recorded, in manner before prescribed, shall vest in such creditor in execution, as good and valid a title thereto as the debtor had therein, when the same was attached on mesne process, or taken in execution.

Mode of levying executions on saw mills, grist mills, &c.

Debtor may redeem real estate taken on execution within one year, paying, &c.  
[1b. § 3.]  
[\*283]

Mode of settling amount of rents, profits, disbursements, &c.

**SECT. 30.** *Be it further enacted,* That when any tenement or lands in part or in whole, shall be taken in execution for debt, it shall and may be lawful to and for the execution debtor, his heirs or assigns, executors or administrators, within\* the space of one year next following the extending execution thereon, to tender (e) the creditor or those claiming under him, the debt for which the same tenement was taken, with interest from the time of the extending the execution, and the reasonable and necessary charges and disbursements laid out and expended thereon in repairing or bettering the same, over and above what the rents, profits and improvements thereof shall fall short of reimbursing such charges and interest, to be accounted for by the execution creditor, or those claiming under him, which disbursements, expenses, rents, profits and improvements may be settled by any three Justices of the Peace in the county where the land lies, at the charge and expense of the debtor, one to be chosen by the debtor, and the other by the creditor, if he shall see cause to choose one, otherwise they may both be chosen by the debtor, and the third by the two Justices so chosen by the parties, or one of

(e) Where several parcels of land are set off, the debtor cannot redeem one without redeeming all. *Bond vs. Bond*, 2 Pick. 382.



them as above directed, and which third shall be chosen before the other two proceed to a consideration of the business ; and if the creditor or the tenant in possession as aforesaid, upon having a tender made of the sum certified under the hands of the said Justices chosen as aforesaid, or either two of them, to be due to him upon the execution, shall refuse to execute a good and lawful deed of release to the debtor or his heirs, (in case of his decease,) of the land or tenements so taken in his execution, the debtor or his heirs, executors or administrators who shall make such tender, may bring his action (*f*) of ejectment against the creditor or the person claiming under him ; and, upon lodging in Court the money tendered, shall recover the title and possession of the land as fully as the debtor held the same before the extending the execution upon it, together with his costs of suit : *Provided nevertheless, That* if the creditor, or the tenant in possession under him as aforesaid, shall, before the bringing the action, have offered the debtor or his heirs, executors or administrators, to make and execute such deed of release, and shall plead the same with disclaimer to the premises ; then and in such case, upon the plaintiff's producing in Court the money so tendered, judgment shall be given for the plaintiff to recover possession of the lands so taken in execution, and the defendant shall recover his cost.

CH. 60.

Creditor on receiving payment to execute release to debtor of the estate,

or be removed from the possession by judgment of Court.

SECT. 31\*. *Be it further enacted*, That whenever any action (*g*) shall be commenced against any manufacturing corporation that may hereafter be created, or whenever any execution may issue against such corporation on any judgment rendered in any civil action and the said corporation shall not, before the day on which the said execution is returnable after demand thereof made upon the President, Treasurer or Clerk

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Executions against manufacturing corporations, if not satisfied,

[Mass. Stat. Mar. 3, 1809,† § 6, and Feb. 14, 1818†.]

(*f*) In each action where the tender has been previously made, it is sufficient that the money be produced and lodged in court at any time before the rendition of judgment. *Foss vs. Stickney*, 5 *Glf.* 390.

(*g*) An aggregate corporation may be liable in an action of *assumpsit*. *Hayden & al. vs. M. T. Corp.* 10 *Mass.* 397.

†Child vs. Coffin, 17 *Mass.* 64; Marcy vs. Clark, *ib.* 330.

†Leland vs. Marsh, 16 *Mass.* 339.

CH. 60. of such corporation by the officer to whom the writ or execution against such corporation has been committed to be served, show to the same officer sufficient personal estate to satisfy any judgment that may be rendered upon such writ, or to satisfy and pay the creditor the sums due upon such execution, then, upon such neglect and default, upon the issuing of an alias execution, the officer to whom such execution may be committed for service, may serve and levy the same writ and execution upon the body† or bodies, and real and personal estate or estates of any member or members of such corporation; or upon the body or bodies, and upon the estate real and personal of any person or persons, who were members of said corporation at the time when the debt or debts accrued, upon which such writs or executions may have issued.

[†Amended; see ch. 221, vol. 3, p. 50, and ch. 385, vol. 3, p. 234.] may be renewed and satisfied by taking the bodies of any of the members of the corporation.

Attachments of property not dissolved by death of either party,

[Mass. Stat. Mar. 17, 1784.]

except in cases of a representation of insolvency.

SECT. 32. *Be it further enacted*, That when any goods or estate are attached upon a writ or process which shall be pending, or may hereafter be pending in the Supreme Judicial Court or Circuit Court of Common Pleas, the same shall not be released or discharged by reason of the death of either party, but be held good to respond the judgment to be given on such suit or process, in the same manner as by law they would have been if such deceased person had been living: *Provided (h) always*, That where any estate attached as aforesaid, shall, by the executor or executors, or administra-

(h) 1. This *proviso* will include only cases where there has been a representation of insolvency, and a commission actually issued. *Grossener vs. Gold*, 9 Mass. 213. See *Rockwood vs. Allen*, ex. 7 Mass. 264.

2. *Bullard vs. Dame*, adm. 7 Pick. 239.

3. Insolvency of an estate cannot be proved by parol; nor can any thing short of a commission of insolvency be competent proof of the dissolution of an attachment on a mesne process against the deceased, according to the provision of § 32. *Maxwell vs. Pike*, 2 Glf. 11.

4. A foreign attachment is dissolved upon the death of the debtor and the issuing of a commission of insolvency upon his estate. *Martin vs. Abbot*, adm. & tr. 1 Glf. 333.

5. Where a judgment was recovered and an execution issued thereon before the death of the plaintiff, and the defendant was committed on the execution after the death of the plaintiff, the Court refused to discharge the prisoner upon the summary process of *habeas corpus*. *Com. vs. Whitney*, 10 Pick. 434.

6. See note c, 1, ch. 51, § 25, ante, p. 233.

tor or administrators of the same, be represented as insolvent, and a commission of insolvency shall thereupon issue ; in all such cases attachments made as aforesaid, shall have no force or efficacy after the death of the original defendant or defendants in the action.

CH. 60.

SECT. 33. *Be it further enacted*, That upon any judgment in any Court of law in this State, in the name or for the use and benefit of this State, for any sum of money, a writ of execution\* in common form shall issue, and be directed to the proper officer, and the lands of such judgment debtor may be taken on such execution and sold at public vendue to the highest bidder. And in every such case, the officer who shall levy such execution, may and shall execute to the purchaser a good deed of any lands so by him sold. And every such officer, before he shall proceed to sell any lands in manner above described, shall give notice in writing of the time and place of sale to the debtor in person, or by leaving the same at his last and usual place of abode, if he be an inhabitant of this State, twenty days before such sale, and shall also give public notice of the time and place of sale by posting up notifications in two or more public places in the town, plantation or township, within which such land may lie, thirty days at least before the time of sale, and shall likewise cause an advertisement of the time and place of sale to be published three weeks successively, in the newspaper employed by the State to publish the laws, and in a newspaper printed in the county where such land may lie, if any such there be, the last publication to be not less than six days before the time of sale. And the officer may, if he deem it necessary, adjourn such vendue not exceeding ten days at any one time, until the sale of such estate shall be completed : *Provided however*, That the judgment debtor shall have the same right to redeem the same, in the same time and manner, as judgment debtors in execution have to redeem real estate set off on execution.

Executions in the name and for the use of the State, how to be served.  
[\*285]

SECT. 34. *Be it further enacted* (i), That when hay in a

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(i) The lien created by § 34, on the articles attached, is not dissolved by taking the security mentioned; and therefore a subsequent sale of such arti-

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Attachment of certain articles, though left in defendant's possession, still continued valid.

barn, sheep, horses or neat cattle are attached on mesne process at the suit of a bona fide creditor, and are suffered by the officer making such attachment, to remain in the possession of the debtor, on security given for the safe keeping or delivery thereof to such officer, the same shall not by reason of such possession of the debtor, be subject to a second attachment, to the prejudice of the first attachment. [Approved March 15, 1821.]

Additional Act, ch. 431, Vol. 3, p. 270.

[\*236]

## Chapter 61.\*

AN ACT concerning Foreign Attachment.

Persons who are liable to be summoned as trustees.

[Mass. Stat. Feb. 23, 1795.]

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That any person or persons, body politic or corporate, entitled to any personal action, excepting detinue, replevin, actions on the case for slanderous words or malicious prosecution, or actions of trespass for assault and battery against any person or persons, or body politic or corporate; having any goods, effects or credits (a) so intrusted or deposited in the hands of oth-

cles by the debtor, even without notice, gives the vendee no rights against the attaching creditor. *Woodman vs. Trafton*, 7 Glf. 178.

(a) 1. Only goods deposited, or a debt due, and not contingent, can be the subject of this statutory process. *Davis & al. vs. Ham & als.* 3 Mass. 33; *Frothingham & als. vs. Haley & als.* 3 Mass. 69; *Willard vs. Sheafe & tr.* 4 Mass. 235; *Grant & al. vs. Shaw*, 16 Mass. 341; *Williams & al. vs. Marston & tr.* 3 Pick. 65; *Rundlet vs. Jordan*, 3 Glf. 47; *Sayward vs. Drew & tr.* 6 Glf. 263.

2. But the contingency must relate to the debt itself, and not to the right of the debtor to recover it. *Thorndike vs. De Wolf & trs.* 6 Pick. 120.

3. So where rent is payable quarterly, the lessee can be held as trustee of the lessor for so many quarters' rent only as are due at the time he is summoned. *Wood vs. Partridge*, 11 Mass. 488.

4. A debt contracted by an agent in his capacity as such, within the scope of his authority and binding upon his principal, is not a debt due from him subject to this process. *Wells vs. Greene & trs.* 8 Mass. 504. See *Brig-*

ers, that the same cannot be attached by the ordinary pro- CH. 61.

*den vs. Gill & al. & tr.* 16 *Mass.* 522; *Titcomb & al. vs. Seaver & tr.* 4 *Glf.* 542.

5. "Credits" mean only debts due from the trustee himself to the principal, and not debts due from other persons, the evidence of which is deposited with the trustee. *Lupton vs. Cutter & al. & trs.* 8 *Pick.* 303.

6. A promise to perform labor to a certain amount is not, until broken, liable to this process. *Wrigley vs. Geyer & tr.* 4 *Mass.* 102.

7. A person cannot be charged in this process as the creditor of another, on account of any receipt by him of money from the latter, on an usurious contract, exceeding the debt of lawful interest. *Boardman vs. Roe & trs.* 13 *Mass.* 104. See *Russell vs. Lewis & als.* 15 *Mass.* 127.

8. A sheriff, having collected money upon an execution not yet returnable, nor demanded by the creditor, cannot be held as trustee of the judgment creditor. *Wilder vs. Bailey & tr.* 3 *Mass.* 289. It is the same, even after the execution has been returned, and before a demand has been made by the creditor. *Pollard vs. Ross & tr.* 5 *Mass.* 319. But if the officer, by a sale of property on execution, levy more money than sufficient to satisfy the execution and costs, he will be chargeable for the surplus as trustee of the execution debtor. *Watson & al. vs. Todd & al. & tr.* 5 *Mass.* 271. See below, 11.

9. Where an attorney, in the exercise of his profession, has received money in satisfaction of a demand in favor of his client, it may be attached in his hands in a foreign attachment, though it was paid in bank bills, and has not been demanded by his client. *Staples vs. Staples & tr.* 4 *Glf.* 532. See *Coffin vs. Coffin*, 7 *Glf.* 298.

10. When property is placed by friends of a debtor in the hands of trustees for his support, to be appropriated at the discretion of the trustees, and in such manner that the debtor has no legal claim for it against the trustees, the law will protect it from attachment by his creditors. *White vs. Jenkins & trs.* 16 *Mass.* 62; *Brigden vs. Gill & al. & tr.* 16 *Mass.* 522.

11. An auctioneer, selling goods by order from a sheriff, and receiving the money for them, is accountable only to the sheriff, and cannot be held as the trustee of those who may have claims on the sheriff for the proceeds. *Penniman & al. vs. Ruggles & tr.* 6 *Mass.* 166. See comments on this case, in *Hawes & al. vs. Langton & tr.* 8 *Pick.* 71; also above, 8.

12. The assignee of a bankrupt, after a dividend declared and ordered, may be held as the trustee of a creditor of the bankrupt for the amount of his dividend. *Deconster vs. Livermore*, 4 *Mass.* 101. See *Selfridge vs. Gill & tr.* ib. 95; *Jones vs. Gorham & tr.* 2 *Mass.* 375.

13. The promisor in a note not negotiable, in favor of a married woman, will be held as the trustee of her husband, even though the consideration be wholly derived from her property. *Shuttlesworth vs. Noyes & tr.* 8 *Mass.* 229.

14. Sailors' wages, unless the vessel has arrived at some port of unlad-

CH. 61. cess of law, may cause not only the goods and estate of the person, against whom such action lies, to be attached in his own hands and possession, but also all his goods, effects and credits, so intrusted (b) or deposited to be attached in

ing, are not within the meaning of the word "credits." *Wentworth vs. Whittemore & tr.* 1 Mass. 471.

15. A judgment debtor liable to execution whether issued or not, is not the trustee of the creditor within the meaning of this statute. Nor is a deputy sheriff, holding such execution. *Sharp & al. vs. Clark & tr.* 2 Mass. 91; *Prescott vs. Parker*, 4 Mass. 170.

16. Neither choses in action, nor land or equity of redemption assigned, in the hands of the assignee, are goods or effects, within the statute. *Andrews vs. Ludlow*, 5 Pick. 28; *Gore vs. Clisby & tr.* 8 Pick. 555; *Bissell vs. Strong & tr.* 9 Pick. 562. Nor notes of a banking company, negotiable by delivery. *Perry vs. Coates & tr.* 9 Mass. 537.

17. Nor where lands are fraudulently conveyed by a debtor. *How, Jr. vs. Field & tr.* 5 Mass. 390; *Ripley vs. Severance & tr.* 6 Pick. 474.

18. Where lands had been so conveyed, and sold by the grantee, the surplus of the proceeds, or of rents without a sale, in the hands of the latter, after paying the sum due him, are liable to this process. *Pierson vs. Weller*, 3 Mass. 564; *Russell vs. Lewis & al. & tr.* 15 Mass. 127. See *Webb vs. Peele & tr.* 7 Pick. 247; *Richards vs. Allen & tr.* 8 Pick. 405; *Hazen vs. Emerson*, 9 Pick. 144; *Bissell vs. Strong, & tr. ib.* 562.

19. But there is no power to compel an assignee to execute a trust in real estate, so as to enable the creditor to reach such surplus of sale, or rents and profits. *Gore vs. Clisby & tr.* 8 Pick. 559. See *Howard vs. Card & tr.* 6 Glf. 352; *Badlam vs. Tucker & al.* 1 Pick. 400.

20. Bank and insurance stocks are liable to this process in the hands of an assignee. *N. E. M. Ins. Co. vs. Chandler & tr.* 16 Mass. 275. See *Maine F. Ins. Co. vs. Weeks & tr.* 7 Mass. 439.

21. Where one has property of another in his hands of a nature not subject to attachment on mesne process or seizure on execution, as hides in the course of tanning, he is liable in this process as the trustee of the owner. *Clark vs. Brown & tr.* 14 Mass. 271, See *Ins. Co. vs. Weeks & tr.* 7 Mass. 439.

(b) 1. It is a general rule, that the goods and effects must either be in the trustee's actual possession, (not constructive) or so within his control that he may be able to turn them out on execution. *Andrews vs. Ludlow & tr.* 5 Pick. 31. See *Swett & al. vs. Brown & tr. ib.* 178.

2. A partner in a commercial house, established in a foreign country, residing here, cannot be held as the trustee of the house on account of moneys advanced to the house, at the place of their domicil. *Kidder & al. vs. Packard & al.* 13 Mass. 80.

whose(c) hands or possession soever they may be found, by an CH. 61.

3. A creditor, happening to have in his hands specific articles belonging to his debtor, has no lien upon them without an attachment; but he may be charged as trustee of his debtor. *Allen vs. Meguire & tr.* 15 *Mass.* 490.

4. This process will lie, although it may not be physically impossible for the officer to attach the specific property in the hands of the trustee. *Burlingame vs. Bell*, 16 *Mass.* 318. See *Parker & al. vs. Kinsman & tr.* 8 *Mass.* 486.

5. If goods thus circumstanced are attached by another creditor after the service of the trustee process, the attaching officer will hold them subject to the lien of the creditor in the trustee process. *Ib.*

6. *Dennie vs. Hart & tr.* 2 *Pick.* 204; *Donnels vs. Edwards & trs.* *ib.* 617; *Ward vs. Lamson & tr.* 6 *Pick.* 353; *Webb vs. Peele*, 7 *Pick.* 247; *Gore vs. Clisby & trs.* 8 *Pick.* 555; *Howland vs. Wilson & tr.* 9 *Pick.* 19; *Baxter vs. Wheeler & tr.* *ib.* 21.

(c) 1. Bodies politic and corporate, except counties, towns and parishes, are subject to this process, by ch. 442, vol. 3, p. 284.

2. A county treasurer, or any public officer, who has money in his hands to satisfy a demand any one has upon him as such officer, cannot be adjudged a trustee. *Chealey & al. vs. Brewer & tr.* 7 *Mass.* 261.

3. An executor cannot be charged as the trustee of one to whom a pecuniary legacy is bequeathed by the will of a testator. *Barnes vs. Treat & tr.* 7 *Mass.* 271.

4. Nor can an administrator be charged as the trustee of a creditor of his intestate. *Brooks vs. Cook & tr.* 8 *Mass.* 246.

5. One who has collected for an executor the amount due on a promissory note made payable to A. B. executor, &c. is liable to a foreign attachment as the trustee of A. B. in a suit against him for a demand due from him personally. *Coburn vs. Ansart & tr.* 3 *Mass.* 319. See *Willard jr. vs. Starrevant & als. & tr.* 7 *Pick.* 194.

6. Where a debtor holds a joint contract against two or more, and his creditor would avail himself of that contract by a trustee process, he must summon all the parties liable to discharge the contract, or the party omitted may legally discharge it. *Jewett vs. Bacon*, 6 *Mass.* 60. See *Parker & al. vs. Danforth & tr.* 16 *Mass.* 302. In such case those summoned will be allowed the benefit of such set-offs as their copartners not summoned are entitled to against the principal. *Goodnow vs. Buttrick*, 7 *Mass.* 140; *Hathaway vs. Russell*, 10 *Mass.* 473.

7. A creditor of one copartner, who wishes to apply by this process to the payment of his debt, a debt due to the partnership, ought to summon as a trustee one of the partners. *Fisk & al. vs. Herrick & tr.* 6 *Mass.* 271. See *Hawes & al. vs. Langton & tr.* 8 *Pick.* 70. [An interesting discussion of this topic may be found in the case of *Lyndon vs. Gerham & al.* & tr. 1 *Gallison's U. S. Circuit Court Reports*, p. 367.]

## CH. 61.

Process to be used by a creditor in such cases.

Mode of serving such process under different circumstances.

Lien on principal's goods, &c. created by service of process.

original writ to issue under the seal of the Circuit Court of Common (d) Pleas, signed by the Clerk, and attested by the first Justice of the said Court, not a party thereto, in the form prescribed by law. And the officer to whom such writ may be directed, shall serve the same by attaching the goods and estate of the principal of the value required, if so much can be found in his precinct, by reading the said writ to him, or by leaving an attested copy thereof at his last and usual place of abode, if he had been an inhabitant or resident within this State at any time within three years next before the suing out such writ, and by reading the same to each of the trustees, or by leaving an attested copy thereof, at such trustee's usual place of abode (e); and in case the principal has not been an inhabitant (f) or resident as aforesaid, a service made on the supposed trustee or trustees, in manner aforesaid, shall be deemed a sufficient service; and the goods, effects and credits of the principal, in the hands and possession of his trustee or trustees at the time such writ was served upon him or them, shall stand bound and be held to satisfy such judg-

8. A debt due to a partnership is not effects or credits of one of the partners, unless the partnership be solvent and he not in debt to it. *Ib. Upham & als. vs. Naylor & als. 9 Mass. 490. See Pierce vs. Jackson, 6 Mass. 242, also, Thorndike vs. De Wolf & trs. 6 Pick. 124.*

(d) By ch. 275, vol. 3, p. 101, Justices of the Peace are invested with jurisdiction in cases of foreign attachment, where the damages claimed are not less than \$5, nor more than \$20. See also ch. 285, vol. 3, p. 125.

(e) 1. This does not intend the case of one absent at sea; but was designed to guard against the fraudulent avoidance of persons liable as trustees. *Touro vs. Coates & tr. 10 Mass. 25.*

2. A person who has never been an inhabitant or resident within the State, but who comes here occasionally in the day time, is not liable to this process. *Ray & al. vs. Underwood & tr. 3 Pick. 302.*

3. If some of the joint debtors are within and others without the State, a service of the trustee process upon such as are resident within, will be sufficient to hold the whole to answer as trustees. *Parker al. vs. Danforth & tr. 16 Mass. 308.*

(f) Where the plaintiff and defendant, and the person summoned as trustee, being all inhabitants of another State, and the only service of the writ being on the supposed trustee, the court dismissed the action ex officio. *Tingley vs. Bateman & tr. 10 Mass. 348. See Gardner vs. Barker & tr. 12 Mass. 36.*



ment (g) as the plaintiff shall recover against the principal ; and when the trustees, named in such writ, do all dwell in one (h) county, such writ shall be made\* returnable in the county where all the trustees dwell, but when the trustees do not all dwell in one county such writ may be made returnable in any county in which any of the trustees dwell.

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Writ to be returnable in the county where trustees dwell, &c.

SECT. 2. *Be it further enacted*, That in all such cases it shall and may be lawful for the plaintiff or his attorney to insert in the process, which may have been served on one or more trustee or trustees, the name or names of any person or persons, in whose hands or possession he or they may suspect that any goods, effects, rights or credits of the absconding debtor or principal are placed or concealed : *Provided however*, That no such name or names shall be inserted after the said writ or process has been served upon the principal or absconding debtor or debtors.

Plaintiff may insert the names of other trustees at any time before service of the process on the principal.

[Mass. Stat. June 19, 1798, § 2.]

SECT. 3. *Be it further enacted* (i), That if the principal

(g) The plaintiff is entitled to judgment for costs against the defendant, after a default, until the final decision, whether one sued as trustee shall be held as such or not. *Wells & al. vs. Banister & tr.* 4 Mass. 514.

(h) Where all the trustees in a foreign attachment live in one county, and the defendant in another, and the action is brought in the latter county, the writ is abateable, within the provisions of § 1: and notwithstanding the defendant was regularly summoned in the action, and the plaintiff had discontinued as to all the trustees. In such case costs will be awarded to the defendant. *Greenwood vs. Fales & tr.* 6 Glf. 405.

(i) 1. It is reprehensible to insert the name of a fictitious trustee, in order to give to the court in one county a jurisdiction of the suit, the defendant and other trustees living in another county. *Barker vs. Taber & tr.* 4 Mass. 81.

2. In such case the court will not stay proceedings on motion, but the fact being found by the jury, the writ will abate. *Davis vs. Marston & tr.* 5 Mass. 199.

3. Where the name of a trustee is collusively inserted for the purpose of giving jurisdiction, the defendant or other trustee may plead this matter in abatement. *Jacobs & al. vs. Mellen & trs.* 14 Mass. 132.

4. If one summoned as trustee out of his own county, he being the only trustee summoned, appear to the writ and move to stay the proceedings against him, or pray judgment whether he shall be holden, he will be discharged as of course, and will be entitled to costs, and perhaps to extra costs. But if he does not appear and is defaulted upon the original process, he can-

## CH. 61.

In case principal is absent from State at time of service, action to be continued—unless.

[Mass. Stat. Feb. 28, 1795, § 2.]

Trustee having goods, &c. may appear & plead in behalf of principal.

If trustee appear at first term he shall recover his legal costs;

shall be absent from the State when such writ shall be served, the Court shall continue the action two terms, that he may have notice, unless the principal after the service of the writ, and before the sitting of the Court shall have come into the State: in which case, it shall be in the discretion of the Court whether to continue the action or not; and when the principal does not appear in his own person, or by attorney, to answer (*j*) such suit, the trustees, or any of them having (*k*) goods, effects or credits of the principal in his or their hands or possession, may appear in his behalf, and in his name plead and defend to final judgment and execution.

SECT. 4. *Be it further enacted*, That if any supposed trustee shall come into Court the first term and declare that he had (*l*) not in his hands or possession, at the time the writ

not plead the same matter in abatement to the *scire facias*, but must submit to an examination; and if it appear that he had no effects at the time of the service, he will not be held to pay, but will recover his costs. *Wilcox vs. Mills*, 4 Mass. 218. [In *Flower vs. Parker & al.* 3 Mason's U. S. C. C. Rep. 247, it was decided that § 7, ch. 59, p. 307, of this volume, is applicable to a judgment rendered in a trustee process.]

(*j*) See ante, p. 307, § 7, note *f*. So where the principal defendant was absent from the State when the writ was served and until after the judgment was rendered, the judgment in the C. C. Pleas was recovered with costs, because the action had been continued only one term. *Bullard vs. Brackett*, 2 Pick. 85.

(*k*) 1. It is not a sufficient bar, by the principal debtor, that the person summoned as trustee had not, at the time of service upon him, any goods, &c. of the principal in his hands. *Dunning vs. Owen & tr.* 14 Mass. 157.

2. A plea in bar that the defendant has had judgment against him as trustee in an action upon this statute is good; although no execution has issued on such judgment, and although it does not appear that the trustee has paid on the judgment any part of the sum he had in his hands as trustee. *Perkins jr. vs. Parker*, 1 Mass. 117. See onward, § 11, note *a*, 2.

3. But where the principal defendant was not an inhabitant of this State, and the service was made on supposed trustees and on another person as his agent, it was holden competent for him to plead in abatement of the writ that such supposed trustees never had any goods, &c. belonging to him, and that no goods of his had been attached; and the facts so pleaded being confessed by demurrer, the writ was abated. *Gardner vs. Barker & tr.* 12 Mass. 86.

(*l*) 1. Without a possession of defendant's goods, &c. one summoned as

was served on him, any goods, effects or credits of the principal, and shall thereupon submit himself to an examination upon oath, and the said declaration (m) shall appear to the Court to be true, the Court shall award him his legal costs†; and if such trustee shall, at the time of service of such writ, dwell in any county, other than that in which the said writ is returnable, the Court shall allow him such further costs, as, with his legal costs, shall, under all the circumstances of the case, be a reasonable compensation to him for his time and expenses in appearing and defending himself against such suit; and every person resident in the county where such\* writ

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[Ib. § 8.]

[†Further provision is made respecting costs, by ch. 382, vol. 3, p. 282.] and if he live in another county, Court may allow him reasonable compensation, &c

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trustee cannot plead for the principal in the absence of the latter. *Blake vs. Jones & tr.* 7 Mass. 28.

2. Nor can he plead in his own name, except when he is personally injured by the process. *Ib.*

3. But a trustee, having "goods" &c. of the defendant, may take any legal exception in abatement. *Ib.*


(m) 1. If the trustee, in whose knowledge the fact ought to be, is doubtful, the court cannot make any presumption in his favor. *Sebor vs. Armstrong & tr.* 4 Mass. 208. But when it appears by the answers of the trustees, that time is wanted to ascertain the condition of the funds in the supposed trustees' hands, the process will always be stayed until full information can be obtained. *Parker & al. vs. Danforth & trs.* 16 Mass. 303. See *Harris Jr. vs. Aiken & al & trs.* 3 Pick. 1; *Thorndike vs. De Wolf & trs.* 6 Pick. 123.

2. The trustee must answer for all goods, effects and credits of the principal in his hands, without regard to the nature of the demands, or to the form of action in which they would be recoverable by the principal; and on the other hand, he is to be allowed to offset all his demands against the principal, of which he could avail himself in any form of action, or any mode of proceeding between himself and his principal—except claims for unliquidated damages for mere torts. *Hathaway vs. Russell*, 16 Mass. 476.

3. Where the trustee owes the principal defendant a debt which is barred by the statute of limitations, he may rely on such bar in his answers. *Hazen vs. Emerson*, 9 Pick. 144.

4. Where a minor son contracts to work for wages, on his own account, and the father knowing it makes no objection, the son's employer will not be liable as the trustee of the father for such wages, unless there is a design to defraud the creditors of the father. *Whiting vs. Earle & tr.* 3 Pick. 201.

5. The trustee is not obliged to disclose communications made to him by other persons, though it seems he may disclose them in his answers, if he is satisfied of their truth. *Hawes & al. vs. Langton & trs.* 8 Pick. 67.

CH. 61.  shall be duly returned, who, being summoned as aforesaid, shall neglect to appear and submit to an examination, as to the supposed goods, effects or credits in his or her hands, and having no reasonable cause to the contrary, in the opinion of the Court where the suit shall be, shall be liable for all costs afterwards arising in such suit, to be recovered and paid out of his own goods and estate, in case judgment shall be finally rendered for the plaintiff; and unless such costs shall be duly recovered against the goods, effects or credits of the principal in the hands of a trustee (n). And if several persons, resident in such county, being duly summoned as aforesaid, shall neglect to appear as aforesaid, judgment and execution against them jointly, shall be awarded for such costs. And persons resident in other counties than where the writ is returnable, shall not be liable for any costs arising on the original process herein provided.

Trustee not appearing first term liable to costs.

Several trustees dwelling in same county, not appearing shall be joint judgment and execution against them for costs.

When plaintiff does not support his action against principal, costs allowed to principal, and trustees.

[Mass. Stat. Feb. 28, 1795, § 4.]

When all trustees are discharged plaintiff may still proceed against principal,

SECT. 5. *Be it further enacted*, That where the plaintiff doth not support his action against the principal, and judgment shall be rendered, that he take nothing by his writ, the Court shall award cost against him, as well in favour of the principal as in favour of such of the persons summoned as trustees severally, who have personally appeared in Court and submitted themselves to an examination, upon oath as aforesaid, and several executions shall issue thereupon accordingly. And where all the supposed trustees, or any one or more of them, come into Court, and are discharged upon examination on oath, as aforesaid, or when the suit shall be discontinued by the plaintiff against them, or against any one or more of them, the plaintiff may notwithstanding proceed against the principal, to trial judgment and execution: *Pro-*

6. Evidence collateral to the trustees' answers is not admissible. *Comstock vs. Farnum & tr.* 2 Mass. 96; *Hawes & al. vs. Langton & trs.* 8 Pick. 67; *Barker vs. Taber & tr.* 4 Mass. 81.

7. The answer of the trustee must be considered as true; and if it be not so, the plaintiffs' only remedy is by special action of the case pursuant to this statute. *Whitman vs. Hunt & tr.* 4 Mass. 272.

(n) The manifest intent of the statute is to mulct a supposed trustee, when by his negligence in submitting to an examination, the creditor has been at expense in prosecuting a fruitless suit against his debtor. *Cleveland vs. Clap & al.* 5 Mass. 209.

*vided however*, That where all the supposed trustees shall be discharged, as aforesaid, or where the plaintiff shall discontinue his suit against all of them, or wherever it shall appear from the record, that there is not any trustee in such suit; in all such cases the plaintiff shall not proceed in his suit against the principal, unless there shall have been such service of the original writ upon the principal as would authorize the Court to proceed to render a judgment against him, in an action brought and commenced\* in the common and ordinary mode of process (o) : but the principal in such case may, if he think proper, come into Court and take upon himself the defence of the said suit : *And provided also*, That costs shall not be awarded in favour of any trustee, against whom the suit shall be discontinued as aforesaid, unless he come into Court the first term (p), and declare that he had not in his hands or possession, any goods, effects or credits of the principal, at the time of the service of the original writ, and thereupon submit himself to an examination upon oath, and such declaration be adjudged by the Court to be true.

SECT. 6. *Be it further enacted*, That when any supposed trustee shall, at the time of the service of the writ upon him, dwell in any other county than that in which the writ is returnable he shall not be required to appear in person in the original suit, nor in any suit upon a writ of scire facias found-

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provided a service has been made on such principal, &c.  
[Mass. Stat. June 16, 1793, § 1.]

but principal may if he think proper appear and answer.  
[\*289]

Trustee not entitled to costs unless he appear at first term and is discharged by Court.

[Mass. Stat. Feb. 28, 1795, § 4.]

Trustee dwelling in other counties not bound to appear at Court in person,

(o) See ante, p. 305, § 2, note c.

(p) 1. Where one was summoned, while at sea, by a copy left at his house, and at the first term after his return disclosed, and was discharged, he was adjudged entitled to his costs. *Turo vs. Coates & tr.* 10 Mass. 25.

2. A trustee is not entitled to costs for appearing and pleading an insufficient plea, effecting a continuance of the action against him; but he may have costs for an appearance at a subsequent term, when examined and discharged, within the equity of the statute. *Wilcox vs. Mills*, 4 Mass. 507.

3. If the trustee appears at the first term, submits to an examination, and is rightly adjudged trustee, but upon an appeal discloses new facts upon which he is discharged, he is not entitled to costs. *Lee vs. Babcock & tr.* 5 Mass. 212.

4. But if the court through mistake adjudge him trustee upon his first examination, and on appeal upon the same examination he be discharged by the S. Court, he will be entitled to his costs. *Cleveland vs. Clap & al.* 5 ib. 208.

# FOREIGN ATTACHMENT.

ed thereon, but such supposed trustee may appear by attorney, and declare whether he had any, and what goods, effects or credits of the principal in his hands or possession, at the time when the writ was served on him, and thereupon offer to submit himself to an examination on oath ; and if the plaintiff shall not see fit further to examine such supposed trustee, his declaration, so made by attorney, shall be deemed and taken to be true : and if the plaintiff shall think proper to examine such supposed trustee on oath, the answers of the trustee, upon such examination, may be sworn to before any Judge of the Circuit Court of Common Pleas for the county (q) in which the trustee may dwell, or before any Justice of the Peace ; and in all cases, when any supposed trustee shall have appeared in Court and submitted himself to an examination on oath in the manner prescribed by law, his answers upon such examination, may be sworn to before any Judge of the Circuit Court of Common Pleas for the county in which the trustee may dwell, or before any Justice of the Peace ; and such examination, being duly filed in the Court in which the writ is pending, shall in every case, have the same effect, and shall be considered in the same manner, in all respects, as if the same had been sworn to in the Court in which the writ is pending.

SECT. 7\*. *Be it further enacted*, That whenever any person summoned as trustee of any debtor, shall in his answers, disclose an assignment to another, of the goods, effects or credits of the principal in his hands, and the plaintiff in the suit shall object that the assignment ought not to have any effect to defeat his attachment, and the Court shall think it just or convenient, that the assignee should become a party (r)

(q) By ch. 469, vol. 3, p. 311, persons summoned as trustees, who are about to leave the State, may, after due notice to the parties, make a disclosure before a Justice of the Peace. By the same act, any person summoned as the trustee of another, he may disclose in the same manner as a person about to leave the State, if the plaintiff consent thereto.

(r) 1. Where the assignee has become a party pursuant to the provisions of § 7, the disclosure of the trustee may be read in evidence to the jury upon the issue made. *Morrell vs. Rogers, & tr.* 1 Glf. 828.

2. An assignee being made party to the suit, pursuant to the provisions

to the suit, the person so stated to be assignee, may for the purpose of trying the validity and effect of the assignment, become a party to the suit, upon his appearing voluntarily and claiming to be so admitted, or by coming into Court, upon being notified for that purpose, by a summons, which the Court where the action is pending, is authorized to issue, to be served and returned in such time and manner as the Court shall think the circumstances of the case may require (s); and if such supposed assignee shall not appear at the time and place named in such summons, his non-appearance shall be entered on the record; or the case may be continued to the next term, for further notice to the assignee, at the discretion of the Court; and if the supposed assignee does not appear in person, or by attorney, the assignment shall have no effect to defeat the plaintiff's attachment; and upon such assignee

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assignee may become a party to the suit voluntarily, or Court may summon him to appear.

His non-appearance to be entered on record.

And if assignee do not appear at second term on further notice, assignment to be ineffectual—

of § 7, the trustee is bound by the result of the ulterior litigation in the suit between the creditor and assignee, in the same manner as they are; though he had no agency in making up the issue. *Fisk & al. vs. Weston & tr.* 5 *Glif.* 410.

3. An assignee of a chose in action, in order to avail himself of the assignment, in case the debtor should be summoned as the trustee of the assignor, must notify the debtor and exhibit to him the evidence of the assignment, that the debtor may be able to disclose the whole matter to the court. *Wood vs. Partridge*, 11 *Mass.* 488; otherwise the trustee will be protected in submitting to be adjudged the trustee of the debtor. *Ib; Comstock vs. Farnum & tr.* 2 *Mass.* 97; *Foster vs. Sinkler & tr.* 4 *Mass.* 450.

4. It seems, that where a debtor is summoned as trustee of his creditor, the court cannot compel him to disclose an assignment of the debt to a third person, where the trustee does not know the fact of the assignment. *Hawes & al. vs. Langton & trs.* 8 *Pick.* 67. See *Adams & al. vs. Cordis*, *ib.* 270.

5. Whether the assignment is regarded as invalid, by the default of the assignee to become a party, or in consequence of its being found so upon trial, it is not expressly provided that the trustee shall be no longer answerable to the assignee. But this results necessarily from the proceedings. "And we entertain no doubt that these proceedings, properly pleaded, would be holden to be an effectual bar against any action, subsequently brought by the assignee against the trustee." *Fisk & al. vs. Weston*, 5 *Glif.* 412.

(s) Where a trustee upon his examination discloses an assignment of his debt to a third person, the court will not yield to a suggestion from the attaching creditor that the assignment is fraudulent. For such a purpose the assignee should have been made trustee. *Gorden vs. Webb & tr.* 13 *Mass.* 215.

CH. 61. becoming a party to the suit, the validity of the assignment, or its effect on the case, shall be tried by the Court, or by a Jury, as the case may require : in which trial, in addition to the usual evidence in other cases, the original defendant may be admitted as a witness, upon the application of either party ; and the Court may award legal costs for and against any of the parties at its discretion ; and either party may appeal from any judgment of the Court, as in other cases.

If assignee appear; validity of assignment shall be tried by Jury.

Original defendant may be witness for either party, in such case.

How execution is to be awarded against principal, and trustee who has not appeared, &c.

[Mass. Stat. Feb. 28, 1796, § 5.]

[\*291]

When execution is returned unsatisfied, trustee not exposing sufficient goods, &c.

[Ib. § 6.]

Plaintiff may sue scire facias against trustees.

SECT. 8. *Be it further enacted*, That when the plaintiff shall recover judgment against the principal, and there shall be any trustee summoned, who shall not have come into Court and discharged himself upon oath, and against whom the suit shall not be discontinued ; the Court shall award execution against the goods, effects and credits of the principal, in the hands and possession of every such trustee,\* as well as against the body, goods, and estate of the principal ; and the execution shall be in the form prescribed by law.

SECT. 9. *Be it further enacted*, That when any execution, issued as aforesaid, shall be returned not fully satisfied, by reason of the trustee not discovering and exposing sufficient (t) goods, effects and credits of the principal, or by reason of the officer's not finding sufficient goods and estate of the principal, to the acceptance of the plaintiff, to satisfy the same, the plaintiff may sue out against the trustees named in such writ of execution, or against any one (u) or more of them, jointly or severally, a writ or writs of scire facias (v), in

(t) Where the fund in the trustee's hand is on interest, and the trustee continues to use it after the service of the writ upon him, he is chargeable with interest up to the time when the money is demanded of him on execution. *Adams vs. Cordis & tr.* 8 Pick. 270.

(u) The reason for providing that the scire facias may be sued against the trustees jointly or severally, undoubtedly was, that they would frequently have no connexion with each other, and the creditor might find it expedient to proceed against one, without the expense and delay of proceeding against all. *Hathaway vs. Russell*, 16 Mass. 475.

(v) 1. Scire facias runs against the persons and property of respondents, by ch. 468, p. 304.

2. It lies against one adjudged trustee, or his executor or administrator, notwithstanding the death of the principal after judgment against him ; unless



due form of law, requiring the defendants in such writs of scire facias named, to show cause why judgment for the sums remaining unsatisfied, should not be rendered against them ; and if any one or more of the defendants, in such writs of scire facias named, the same being returned duly served, shall come into Court and declare, that he had not at the time of the service of the original writ upon him, any goods, effects or credits of the principal in his hands, or possession, and thereupon submit to an examination, upon oath ; and if, upon such examination the supposed trustee shall appear not to be chargeable, the Court shall render judgment against him, if resident in the county where the original process was returnable, as the case may be, for costs (*w*) only : and if not resident in such county then the supposed trustee, so discharged, shall have costs ; but if, upon such examination, it shall appear to the Court that the said trustees, or any one or more of them, had goods, effects or credits of the principal in his or their hands, at the time of serving the original writ as aforesaid, other than such as he or they have discovered and exposed to be taken to satisfy the execution on the first judgment, then the Court shall enter up judgment against him or them to the amount of the sums returned unsatisfied upon the said execution, if there shall appear, upon such examination to have been goods, effects or credits to that amount in his or their hands, not discovered (*x*) and exposed as aforesaid ; but if not, then the Court shall enter up judgment against him or

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To be duly served.

Proceedings to be had on such scire facias when trustee appears.

his estate be represented insolvent. *Patterson & als. vs. Patten*, ex. 15 *Mass.* 473.

3. But it does not lie in any case, until an execution has issued, and has been returned unsatisfied. *Ib.*

[In *Flower vs. Parker & al.* 3 *Mason's U. S. Rep.* 247, it was holden that unless the original execution be sued out or renewed within the year, it cannot afterwards be issued against the trustees, nor the plaintiff's right be recovered by scire facias.]

(*w*) For the costs of the scire facias, and not of the original process. *Cleveland vs. Clap & al.* 5 *Mass.* 208; *Rivers vs. Smith*, 1 *Pick.* 164.

(*x*) If it appear that the defendant in scire facias had discharged himself upon the original execution, he recovers his costs as the party prevailing. *Cleveland vs. Clap*, 5 *Mass.* 208.

CH. 61. them to the amount(y) of the said goods, effects or credits in his or their hands,\* not discovered and exposed, as aforesaid: *Provided nevertheless*, That where any trustee has come into Court, upon the original process, and been examined upon oath, as aforesaid; and upon such examination, it has appeared to the Court, that such trustee had goods, effects or credits of the principal, in his hands, at the time of serving the original writ, such trustee shall not be again (z) examined upon the scire facias, but judgment shall be rendered upon his examination had as aforesaid.

[\*292]  
Proviso, where trustee has been examined on original process, judgment shall be rendered on that examination.

Proceedings on scire facias when defendant is defaulted, not having appeared, &c. on the original process.

[Ib. § 7.]

Court may enter up joint or several judgments;

and in judgments on scire facias execution to issue in common form.

Goods, &c. so taken from trustee shall discharge him from the principal as to the same.

[Ib. § 8.]

SECT. 10. *Be it further enacted*, That if any trustee, upon whom the writ of scire facias shall be served, shall not appear, but shall be defaulted, he having never been examined upon oath under the original process, he shall be deemed and taken to have had in his hands and possession, at the time of the service of the original writ, goods, effects and credits of the principal, to the amount of the judgment rendered against him, and judgment shall be rendered against the trustee accordingly. And where there shall be more than one defendant, in any such writ of scire facias, the Court may enter up joint or several judgments, according to the circumstances of the case; and upon all judgments rendered upon such writs of scire facias, execution shall issue in common form against the goods and estate, and for want thereof, against the bodies of such person or persons against whom judgment shall be so rendered.

SECT. 11. *Be it further enacted*, That goods, effects and credits of any person so taken as aforesaid, by process of law, out of the hands of his trustee, shall forever acquit and discharge such trustee from and against all suits, damages and demands whatever, to be (a) commenced or claimed by

(y) But in neither case for costs. *Cleveland vs. Clap & al.* 5 Mass. 208.

(z) Not even for the purpose of correcting a mistake. *Taylor vs. Day & al.* 7 Glf. 130.

(a) 1. It is established as a general rule, that a defendant in an action already commenced, may be charged as the trustee of the plaintiff, in a suit subsequently commenced, on account of the cause of such first action, if he be summoned before the state of the proceedings or pleadings in the former

his principal, his executors or administrators of and for the same : and if any trustee shall be sued on account of any thing by him done pursuant to this act, he may plead the general issue and give this act in evidence.

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Trustee may plead general issue in suits against him.

SECT. 12. *Be it further enacted*, That any person, summoned as a trustee, as aforesaid, who shall upon his examination, had as aforesaid, knowingly and wilfully, answer falsely, shall upon conviction thereof in the Supreme Judicial Court, be adjudged to be guilty of perjury, and be liable and subject to all the pains, penalties, forfeitures and disabilities\* thereto by law incident ; and shall also out of his own proper estate be liable and subjected to pay to the plaintiff in the action, his executors or administrators, the full amount of such judgment as he, they or any of them may have recovered against the principal, in case the same be unsatisfied ; otherwise, such part thereof as may remain unsatisfied, to-

Punishment of trustee for wilful false swearing.

[Ib. § 9.]

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Liability of such trustee to pay out of his own estate the amount of plaintiff's demand against principal and double costs.

action become such, that he cannot, by the rules of law, defend himself by showing in it that the debt or property sued for is attached in his hands. *Thorndike vs. De Wolf, & trs.* 6 Pick. 123. In this case, Parker, C. J. stated the rule as above, and remarked : "This was settled in the case of *Howell vs. Freeman & tr.* 3 Mass. 121. It had been better perhaps originally, that the commencement of a suit against the debtor should have exempted him from the trustee process, and it was so determined in the case of *Gridley vs. Harraden*, found in the appendix of 14 Mass. p. 496. This case was decided in the year 1780, under the old provincial trustee act passed in 32 Geo. 2. Under the present existing statute, it has never been determined, that the mere commencement of a suit for a debt prevents the operation of the statute. On the contrary, this process has been maintained, after such suit commenced, as in the case of *Locke vs. Tippets & trs.* 7 Mass. 143; *Kidd vs. Shepherd*, 4 Mass. 238, and *Foster vs. Jones*, 15 Mass. 185."

2. It is no cause to abate a writ, that the defendant has been sued as the trustee of the plaintiff, and that the process is still pending: but it is ground for a continuance while the process is pending: and during such continuances the plaintiff may not tax costs for travel and attendance. *Winthrop vs. Carlton jr.* 8 Mass. 456. See ante, note k, 2, p. 362. Yet a trustee judgment is no protection to the trustee, against the claims of the person whose effects or credits were in his hands, unless it has been satisfied. *Wise vs. Hilton*, 4 Glf. 435.

3. It is competent for one, whose debtor attempts to discharge himself by shewing that he has paid on a trustee process, or that he had discharged himself from that action on oath, to prove that the debt still remains due. *Groves vs. Brown*, 11 Mass. 334.

CH. 61. together with the legal interest thereof, and double costs of suit, to be recovered in a special action on the case.

Where by disclosure it appears that trustee is bound to deliver to the principal specific articles, at a future day, he may deliver same to the officer to satisfy the execution in whole or in part.

[Ib. § 10.]

Value of such articles, how to be ascertained.

Proviso—in case of special agreement as to value.

Officer to sell the same as in other cases.

[\*294]

Where part only is sold trustee may

SECT. 13. *Be it further enacted*, That in every case where it shall appear, by the answer of the trustee, that he was, at the time of the service of the summons on him holden or bound to deliver to the principal at a future day (*b*), any specific article or articles whatsoever, such trustee shall be and hereby is authorized and permitted on demand made by the officer having any execution in his hands, issued upon any judgment, recovered by virtue of this act, to deliver to him such specific article or articles, or so much thereof as may be necessary to satisfy such execution, with the legal fees thereon; the value of such article or articles, as between the principal and trustee to be estimated and ascertained by the appraisal of three disinterested and discreet men, one to be chosen by the trustee, one by the officer, and one by the principal, if he see cause; or if he neglect or refuse, then the officer shall appoint two of the said appraisers, who shall all be sworn before a Justice of the Peace in and for the county where such article or articles are to be delivered, faithfully and impartially to appraise the same: and the said Justice and appraisers shall make, on such execution, a certificate of their respective doings: *Provided however*, That in all cases where by the terms of the contract between the principal and trustee any mode is pointed out for ascertaining the value of such specific articles, the principal and trustee, or either of them, may have their value thus ascertained and estimated: and in either case, the officer shall proceed to sell such articles and conduct in the sale thereof as in other cases of sales of personal property on execution, as is already by law provided; the overplus monies, after satisfying the execution and his fees, he shall pay over to the principal, if within the precinct of the officer, otherwise to\* the trustee. And in all cases where a part only of such specific articles shall be taken in execution as aforesaid, the trustee is hereby authorized to

(*b*) A debt payable at a future day upon a contingency, is not subject to a foreign attachment within the meaning of § 13. *Frothingham & als. vs. Haley & al.* 3 Mass. 69. See *Jewett vs. Bacon*, 6 Mass. 60; *Andrews vs. Ludlow & trs.* 5 Pick. 28. See ante, note *a*, p. 356.

deliver the residue to the principal, or make tender thereof within thirty days after such execution shall have been satisfied, in the same manner as by law he might otherwise have delivered the whole. CH. 61.  
deliver residue to principal.

SECT. 14. *Be it further enacted*, That whenever any person who shall be summoned as a trustee as aforesaid, shall die before (c) he may have been examined as aforesaid, his executors or administrators may appear; or if the plaintiff think proper, be compelled to appear and make answer to the suit, in the same way and manner executors and administrators are allowed or compellable to appear and answer to suits and actions in other cases. And in case of the death of any trustee, after his examination, and previous to the rendering of final judgment against the principal, the executors and administrators of such deceased trustee shall be liable and answerable to perform whatever such trustee, by his answer, would have been liable to do and perform, in case he had lived. If trustee die before examination, his executor or administrator may answer. [Ib. § 11.]  
If trustee die after examination and before final judgment against principal—executor or administrator answerable, &c.

SECT. 15. *Be it further enacted*, That no person shall be considered or adjudged to be a trustee, within the intent and meaning of this act, by reason or on account of his having made, given, endorsed, negotiated or accepted any negotiable security whatever (d). No persons liable as trustees by having given, endorsed, &c. negotiable securities. [Ib. § 12.]

(c) 1. If the trustee die after his examination and also after judgment against the defendant, there seems to be no difficulty in the way of an execution being issued as of a day or term where both parties were living. *Patterson & al. vs. Buckminister & tr.* 14 Mass. 144; *Patterson & al. vs. Patten, ex.* 15 Mass. 473.

2. The death of the plaintiff will have no other effect upon the trustee, than what results from its effect upon the process generally; as if by his death the action abate, in which case neither the defendant nor the trustee will recover costs. *Cutts & al. vs. Haskins*, 11 Mass. 56.

3. If the defendant die in a state of insolvency, and his estate be co-represented, the trustee will be thereby discharged whether such defendant die before or after judgment in the process. *Patterson & al. vs. Patten, ex.* 15 Mass. 474. See *Stanwood vs. Scovel*, 4 Pick. 424; *Martin vs. Abbot & tr.* 1 Glf. 333.

(d) 1. An indorser of a promissory note after a verdict obtained against him by the indorsee and before judgment, cannot be sued as the trustee of the indorsee. *Emerson vs. Healy & tr.* 2 Mass. 32. See ante, note a, 1.

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SECT. 16. *Be it further enacted, That (e) whenever*

Judgment creditors may have the benefit of this act—discharging the principal's body from prison, (if committed) within seven days, by note in writing.

any judgment creditor shall discover goods, effects or credits of his debtor, that are not attachable by the common and ordinary process of law, he shall be entitled to the process provided in this act; and upon the agent, factor or trustees being summoned in the manner this act directs, all the money, goods, effects and credits in his hands shall be secured to respond the judgment that may be given thereon, and he shall answer thereunto, at the first term, in case his principal has personal or other sufficient and legal notice of the suit, fourteen days before the Court's sitting: *Provided always*, That upon a judgment creditor's pursuing such remedy to recover his debt, he shall, within seven days after the same process on the supposed agent is served, discharge the body of the debtor (in case he is taken in execution upon the same\* judgment) by a note or memorandum, in writing, directed and delivered to the officer who has him in custody, stating the reason and occasion of the discharge of the person of the debtor; and such a discharge shall not annul, or in any manner injure the original judgment: but in case the judgment creditor shall not within the seven days discharge the person of the debtor, in manner aforesaid, the process commenced as aforesaid, shall abate, and the debtor shall recover treble costs. [Approved February 28, 1821.]

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Such discharge not to injure original judgment.

Process to abate, unless discharged within 7 days.

Additional Act, ch. 275, Vol. 3, p. 101.

2. A promissory note to bearer payable in goods is not a negotiable security within the meaning of § 15. *Clark vs. King & tr.* 2 Mass. 524.

(e) If a debtor be committed in execution, and the creditor sue out a foreign attachment under the provisions of § 16, and release the body of the debtor from prison, and the supposed trustee is afterwards discharged, having no effects of the debtor; the foreign attachment may still be prosecuted to final judgment against the debtor, and the release of his body is no discharge of the debt; but he may be taken again in execution by virtue of the judgment in the foreign attachment. *Cutts vs. King*, 1 Glf. 158.

## Chapter 62.

## CH. 62.

AN ACT for the Limitation of Actions real and personal, and of Writs of Error.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That after the fifteenth day of March, which will be in the year of our Lord one thousand eight hundred and twenty-five, no person shall sue or maintain any writ of right, or make any prescription, title or claim, to any lands, tenements or hereditaments, or to any rents, annuities, or portions issuing therefrom, upon the possession or seizin of his or their ancestor or predecessor, beyond the term of thirty years, next before the test of the same writ (a).

Limitation of writ of right to 30 years.

[Mass. Stat. July 4, 1796, § 1, and Mar. 3, 1803, § 1.]

SECT. 2. *Be it further enacted*, That after the fifteenth day of March, which will be in the year of our Lord one thousand eight hundred and twenty-five, no person shall sue, have or maintain any writ of entry, upon disseizin done to any of his ancestors or predecessors, or any action possessory, upon the possession of any of his ancestors or predecessors, for any lands, tenements or hereditaments, unless the ancestor or predecessor, under whom the demandants shall claim, shall have been seized or possessed of the lands, tenements or hereditaments demanded, within twenty-five years next before the test of the same writ or bringing such action (a).

Ancestral or possessory actions limited to 25 years.

[Ib. § 2.]

SECT. 3. *Be it further enacted*, That after the fifteenth day of of March, which will be in the year of our Lord one thousand eight hundred and twenty-five, no person or body corporate\* or politic, shall sue for, have or maintain any action for any lands, tenements or hereditaments, upon his or their own seizin or possession above twenty years next before the test of the same writ (a).

—Of action on demandant's own seizin, 20 years.  
[Ib. § 3.]  
[\*296]

SECT. 4. *Be it further enacted*, That all writs of formedon in descender, formedon in remainder, or formedon in

Formedons and right of entry.

(a) 1. See a modification of § 1, 2 and 3 of this ch. by ch. 307, vol. 8, p. 150.

2. Statutes of limitation are beneficial statutes, made to quiet people in their possessions, and to prevent suits at law, after an unreasonable delay in commencing them. *Eager & ux. vs. Com. in error*, 4 Mass. 182.

## CH. 62.

[Ib. § 4.]

Proviso in favour of femes covert, infants, &c.

In certain cases of entry into lands, the tenant, having had possession more than six years, may recover of the person entering the value of improvements, &c

reverter, of any lands, tenements or hereditaments whatsoever, hereafter to be sued or brought, shall be commenced within twenty years next after the title or cause of action first descended, and at no time after the said twenty years. And no person, unless by judgment of law, shall at any time hereafter, make any entry into any lands, tenements or hereditaments, but within twenty years next after his right or title, first descended or accrued to the same, and in default thereof, such person so not entering, and his heirs shall be utterly excluded and disabled from making such entry thereunto : *Provided always*, That when any person that is or shall be entitled to any of the writs of formedon aforesaid, or to make any entry into lands, tenements or hereditaments, shall at the time the said right or title first descended, accrued or fell, be within the age of twenty one years, feme covert, non compos, imprisoned or beyond seas, or without the limits of the United States, that then such person shall and may bring such suit or make such entry at any time within ten years after the expiration of the said twenty years aforesaid, and not afterwards (b).

SECT. 5. *Be it further enacted*, That if any person shall make such entry into any lands, tenements or hereditaments, which the tenant or those under whom he claims, have had in actual possession for the term of six years or more before such entry, and withhold from such tenant the possession thereof, such tenant shall have right to recover of him so entering, in an action for money laid out and expended, the increased value of the premises, by virtue of the buildings and improvements made by such tenant or those under whom he claims ; such right and value to be ascertained by the same principles as regulate such right and value under the act for the settlement of certain equitable claims arising in real actions (c): *Provided*, Such entry so made by the proprie-

(b) When the statute of limitations has once begun to run against the heir in tail, no subsequent court can interrupt its progress; and after it has run twenty years, no *formedon* can afterwards be maintained. *Dow vs. Warren*, 6 *Mass.* 329.

(c) See ante, ch. 47, p. 201; also, ch. 344, vol. 3, p. 190, and ch. 397, ib. p. 246.



tor\* or owner, shall have been made while the tenant was in actual possession of the premises and against his consent. CH. 62.

SECT. 6. *Be it further enacted (d)*, That in any writ or action which has been or may be hereafter brought for the recovery of any lands, tenements or hereditaments, it shall not be necessary for limiting the demandant and barring his right of recovery, that the premises defended shall have been surrounded by fences or rendered inaccessible by other obstructions, but it shall be sufficient if the possession, occupancy and improvement thereof by the defendant or those under whom he claims, shall have been open, notorious and exclusive,† comporting with the ordinary management of similar estates in the possession and occupancy of those who have title thereunto, or satisfactorily indicative of such exercise of ownership as is usual in the improvement of a farm by its owner; and no part of the premises demanded and defended shall be excluded from the operation of the aforesaid limitation, because such part may be woodland or without cultivation.

[\*297]

Nature of the possession and occupancy of the tenant which will bar the action of demandant.

[†See ch. 307, § 2, vol. 3, p. 151.]

SECT. 7. *Be it further enacted (e)*, That all actions of

(d) 1. § 6 was enacted to abolish the distinction, existing at common law, between a possession under a *deed recorded*, and a possession without such title on record; attaching, as against the demandant, the same legal consequences to both. *Prop. K. Purchase vs. Laboree & als.* 2 *Glf.* 275.

2. So far as § 6 is *retrospective*, it is unconstitutional, and cannot be carried into effect, because it would impair vested rights. *Ib.*

(e) 1. Where the maker of a note denied his signature, declaring the note to be a forgery; but said, *if it could be proved that he signed the note, he would pay it*; and it was so proved at the trial; this was held sufficient to take the case out of the statute. *Seaward vs. Lord*, 1 *Glf.* 163.

2. This statute applies to civil actions at common law; and not to a claim made before the Judge of Probate against an administrator for rents. *Heald adm. vs. Heald & als.* 5 *Glf.* 387.

3. To take a demand out of the statute, there must be either an absolute promise to pay the debt, or a conditional one accompanied by proof of performance of the condition; or an unambiguous acknowledgment of the debt, as still existing and due. *Porter vs. Hill*, 4 *Glf.* 41; *Deshon & al. vs. Eaton*, *ib.* 413.

4. Proof that the defendant said, "*If I owe you any thing I will pay you; but I owe you nothing*,"—is not a new promise, that will avoid the statute. *Perley vs. Little*, 3 *Glf.* 97.

CH. 62. trespass *quare clausum fregit*, all actions of trespass, detinue, trover or replevin for goods or cattle, all actions of account and upon the case, other than such accounts (*f*) as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt, grounded upon any lending or contract, without specialty, all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them, shall be commenced and sued (*g*) within the time and limitation here-

Limitation of personal actions.

[Mass. Stat. Feb. 18, 1787, § 1.]

5. It is not within the province of the jury to determine what acts or declarations amount to a new promise. *Miller vs. Lancaster*, 4 *Glf.* 159.

6. Where the acknowledgment is accompanied by circumstances showing an intention to insist on the benefit of the statute, no promise to pay can be implied. *Bangs vs. Hall*, 2 *Pick.* 368.

7. In mutual dealings between party and party, if there be items on both sides within six years, this statute will not attach to those of an earlier date. *Davis vs. Smith*, 4 *Glf.* 337.

8. If there be an item in the defendant's account within six years, this will take the plaintiff's account out of the statute, though the latter contain no item within that period. *Ib.*

9. A new promise by the maker of a note takes it out of the statute of limitations only so far as he is concerned; but will not affect any of the rights of a collateral party to the note. *Gardiner vs. Nutting & al.* 5 *Glf.* 140.

10. The acknowledgment of a debt by one of several joint defendants, is sufficient to take the case out of the statute of limitations as to them all. *Getchell adm. vs. Heald & als.* 7 *Glf.* 26.

11. A fraudulent concealment by the defendant of the plaintiff's cause of action, will take the action out of the statute. *Mass. T. C. vs. Field & als.* 3 *Mass.* 201.

12. An admission within six years of a promise or contract as undischarged, takes such promise or contract out of the statute. *Baxter vs. Penniman*, 8 *Mass.* 183.

13. A promise made on the first of November 1811, was sued on the first of November 1817; and it was holden to be barred by this provision. *Presbrey & als. vs. Williams*, 15 *Mass.* 193.

(*f*) By this word "accounts," is intended open or current accounts as distinguished from stated accounts. Stated accounts are those which have been examined by the parties, and where a balance due from one to the other has been ascertained and agreed upon as correct. *McLellan vs. Crofton*, 6 *Glf.* 336.

(*g*) 1. The time of the actual making of a writ, with an intention of service,

CH. 62.

after expressed and not after ; that is to say : the said actions upon the case, other than for slander, and the said actions of account ; and the said actions of trespass, debt, detinue and replevin for goods or cattle, and the said actions of trespass *quare clausum fregit*, within six years next after the cause of such actions or suits, and not after ; and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within three years next after the cause of such actions or suits, and not after ; and the said actions upon the case for words, within two years next after the words spoken, and not after : *Provided always*, That if upon any of the said\* actions or suits, judgment be given for the plaintiff, and the same be reversed by reason of error or a verdict pass for the plaintiff, and for matter alleged in arrest of judgment, the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, that in all such cases the party, plaintiff, his executor or administrator, as the case shall require, may commence a new action or suit, from time to time, within a year after such judgment reversed or such judgment given against the plaintiff, and not after.

Proviso in case  
of reversal of  
judgment, &c.  
[\*298]

SECT. 8. *Be it further enacted*, That any action of the case or of debt grounded upon any lending or contract, or for arrearages of rent, which shall be actually declared upon in a proper writ, returnable according to law, purchased therefor, within the term of six years next after the cause of such action accrued ; shall be deemed and taken to be duly commenced and sued (*h*) within the meaning of this act.

What shall be  
deemed the  
commence-  
ment of a suit.

[Mass. Stat.  
Feb. 27, 1794,  
§ 1.]

SECT. 9. *Be it further enacted*, That this act shall not be understood to bar any infant, feme covert, person imprisoned or beyond sea, without any of the United States, or non compos mentis, from bringing either of the actions before mentioned in the seventh section of this act, within the term before set and limited for bringing such action, reckoning from the time that such impediment shall be removed : and

Limitation not  
to apply to  
femes covert,  
infants, &c.  
until disability  
is removed.

[Mass. Stat.  
Feb. 13, 1787,  
§ 4.]

is the time when an action is "commenced and sued," within the meaning of this provision. *Johnson vs. Farwell & als.* 7 *Gl.* 370.

2. The date of the writ is not conclusive evidence of the time when it was sued out, so as to affect a plea of the statute of limitation. *Ib.*

(*h*) See last preceding note.

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if any person or persons against whom there is, or hereafter shall be, any cause of suit, for every and any of the species of action herein before enumerated in said seventh section of this act, who at the time the same accrued was without the limits of this State, and did not leave property or estate therein that could by the common and ordinary process of law be attached (i); that then and in such case, the person that is entitled to bring such suit or action, shall be at liberty to commence the same within the respective periods before limited after such persons return (j) into this State.

Nor to actions on cash notes witnessed, when brought by promisee, or his executor or administrator.

[Ib. § 5.]

[\*299]

SECT. 10. *Provided (k) always, And be it further enacted,* That this act shall not extend to bar any action hereafter brought upon any note in writing, made and signed by any person or persons and attested by any one or more witnesses, whereby such person or persons has promised, or shall promise to pay to any other person or persons, any sum of money mentioned\* in such note, but all actions upon such note or notes, brought by the original promisee, his executor or administrator shall and may be maintained as if this act had

(i) This provision is general, and is not applicable to inhabitants of this State only, but to all persons who are without the State, and have not attachable property within it. *Dwight vs. Clark*, 7 Mass. 518. See *Vans vs. Higginson*, 10 Mass. 80.

(j) 1. The "return" must be such as will enable the creditor, using reasonable diligence, to arrest his body as security. *White vs. Bailey*, 3 Mass. 271.

2. Foreigners, who have never been in the United States, are within the exception, and may bring their action at any time within the limitation of the statute, after their coming within the States. *Hall vs. Little*, 14 Mass. 203.

3. Having an agent here will not bring them within the statute. *Wilson vs. Appleton*, 17 Mass. 180.

(k) 1. A promissory note payable in *specific articles* is within the meaning of this proviso. *Gilman vs. Wells*, 7 Glf. 25.

2. It is a material alteration of a note to cause the name of a person to be placed on a note as a witness, when he was in no respect a witness to any part of the transaction. *Homer vs. Wallis*, 11 Mass. 312.

3. It is a sufficient witnessing, although there be no words over the name, indicating the intent of the subscription by the witness. *Faulkner vs. Jones*, 16 Mass. 290.

never been made ; any thing herein contained to the contrary notwithstanding.

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SECT. 11. *Be it further enacted*, That any action which shall be actually declared in as aforesaid, and in which the writ purchased therefor, shall fail of a sufficient service or return by any unavoidable accident or by the default, negligence or defect of any officer to whom such writ shall be duly directed, or when such writ shall be abated or the action thereby commenced shall be avoided by demurrer or otherwise, for informality of proceedings ; then and in any such case, the plaintiffs or plaintiff, or his or her executor or administrator, may commence another action upon the same demand and shall thereby save the limitation thereof, any thing in this act to the contrary notwithstanding : *Provided*, That such second action shall be duly commenced by declaring in the same aforesaid and pursued at the next Circuit Court of Common Pleas of the county in which trial of the cause may be had, or within three months next after the Court whereto such former writ was or shall be returnable, or wherein judgment of abatement or other evidence of such suit shall happen and not afterwards.

In case of failure of service of writ, &c. or abatement of it, what measures plaintiff may pursue to avoid the limitation.

[Mass. Stat. Feb. 27, 1794, § 2.]

SECT. 12. *Be it further enacted*, That any action of the case or of debt, grounded upon any lending or contract, or for arrearage of rent, which might have been or which may be sued and prosecuted by or against any person deceased, or who shall de cease, at the time of his or her death, or within thirty days next preceding, shall and may be commenced by declaring in the same as aforesaid, and sued by or against the executor or administrator of such deceased person, within two years after the grant of letters testamentary, or of administration, and not afterwards, if otherwise barred by this act, any thing which may be supposed herein to the contrary notwithstanding (1).

If creditor or debtor dies and suit might be brought within 30 days next before such death—how limitation applies.

[Ib. § 3.]

[†See ante, ch. 52, § 26, p. 283.]

SECT. 13. *Be it further enacted*, That in any action which shall be brought, for any debt upon simple contract, or promise in writing, not under seal, the defendant therein may give in evidence upon the general issue, his or her de-

In actions on simple contract or promise in writing, not under seal, defendant may

(1) Codman, ex. vs. Rogers, admx. 10 Pick. 112.

CH. 62. *mands\** against the plaintiff, for goods delivered, monies paid, or service done, whereof an account shall be duly filed in the Clerk's office of the Court whereto such action is, or shall be brought, seven days, and before a Justice four days, at least, preceding the time of trial. And in all cases of mutual demands as aforesaid, the account of the defendant, if any time of limitation shall be objected thereto by the plaintiff, shall be considered and allowed as if an action had been duly commenced thereon, by declaring in the same, at the time when the plaintiff's action was or shall be commenced, any law, usage or custom to the contrary notwithstanding.

file account in  
offset, 7 days  
before Court.

[\*300]

[Ib. § 4.]  
In such cases  
limitation as to  
the account  
will relate to  
the commence-  
ment of the ac-  
tion.

Limitation of  
actions on pe-  
nal statutes.

[Mass. Stat.  
June 19, 1788,  
§ 1.]

SECT. 14. *Be it further enacted (m)*, That all actions, suits, bills or informations which shall hereafter be had, brought, sued or commenced, for any forfeiture upon any penal statute, made or to be made, the benefit whereof is or shall be by the said statute limited in whole or in part to the person or persons who shall inform and prosecute in that behalf shall be had, brought, sued or commenced by any person that may lawfully pursue the same as aforesaid, within one year next after the offence committed, or to be committed against the said statute ; and in default of such pursuit, then the same shall be had, brought or prosecuted for the State, at any time within two years after the offence committed ; and if any action, suit, indictment or information, for any offence against any penal statute shall be brought after the time in that behalf limited, the same shall be void and of none effect, any act to the contrary notwithstanding : *Provided always*, That when any action, suit or information is or shall be limited by any penal statute, to be had, sued, commenced or brought within a shorter time than is above mentioned, in every such case, the action, suit or information, shall be brought within the time limited by such statute.

Limitation of  
writs of error.  
[Feb. 15,  
1806.]

SECT. 15. *Be it further enacted*, That no judgment in any action or suit heretofore, or which hereafter may be rendered, shall be reversed or avoided for any error or defect

(m) The provision of § 14, may be given in evidence under the general issue. *Moore vs. Smith*, 5 Glf. 490.

therein, unless the writ of error (*n*) brought for reversing the same be sued out within twenty years next after the rendition of such judgment : *Provided always*, That if any person who is\* or shall be entitled to such writ of error, shall at the time such title accrued, be within the age of twenty-one years, covert or non compos mentis ; then such person, his or her heirs, executors or administrators notwithstanding the said twenty years expired, may bring a writ of error for the reversing of any such judgment, as such person might have done in case this act had not been made, so as the same writ of error be sued out within five years after the coming of age, discovery, coming of sound mind, or death of such person, whichever shall first happen, and not afterwards.

CH. 63.

[\*301]  
 Proviso in fa-  
 vour of persons  
 incapacitated,  
 &c.

SECT. 16. *Be it further enacted*, That all actions against Sheriffs, for the misconduct and negligence of their deputies, shall be commenced and sued within four years next after the cause of action (*o*). [Approved March 19, 1821.]

Limitation of  
 actions against  
 Sheriffs, for  
 misconduct of  
 their deputies.

Additional Act, ch. 307, Vol. 3, p. 150.

## Chapter 63.

AN ACT prescribing the Forms of Writs and other process in the cases therein mentioned.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That in all civil actions, the original and final process in the following cases

Forms of pro-  
 cess.  
 [Mass Stat.  
 Oct. 30, 1784,  
 § 1.]

(*n*) 1. A writ of error need not be endorsed. *Grosvenor vs. Danforth*, 16 Mass. 74.

2. It does not lie upon a judgment of a justice of the Peace from which judgment an appeal lies to C. C. Pleas, nor upon a judgment of C. C. Pleas, where an appeal lies to this court. *Savage vs. Gulliver*, 4 Mass. 171.

(*o*) 1. Such action survives to the administration of the judgment creditor. *Paine vs. Ulmer*, 7 Mass. 317.

2. In such action for taking insufficient bail, the limitation of four years commences only from the return of *non est inventus* upon the execution against the principal. *Rice & als. vs. Homer*, 12 Mass. 127.

CH. 63. betwixt party and party, shall be made out in the forms (a) following, that is to say ;

Original summons.

[Summons.]

STATE OF MAINE.

SEAL. S — ss. To the Sheriff of our county of S —, or his deputy,  
Greeting.

We command you that you summon A. B. of C. [addition] (if he may be found in your precinct) to appear before our Justices of our — Court of —, to be holden at B. within and for our said county of S. on the — day of — then and there in our said Court to answer to D. E. of R. within our county of M. [addition] in a plea of (b) —; to the damage of the said D. E. (as he saith) the sum of — dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein. Witness, E. H. Esq. at B. the — day of — in the year of our Lord —.

A. D. Clerk.

[\*302]  
Capias or attachment.

[\* Capias or Attachment.]

STATE OF MAINE.

SEAL. C — ss. To the Sheriff of our county of C — or his deputy,  
Greeting.

We command you to attach the goods or estate of R. F. of B. within our county of C — [addition] to the value of — dollars; and for want thereof to take the body (c) of the said R. F. (if he may be found in your precinct,) and him safely keep, so that you have him before our Justices of our — Court of —; next to be holden at B. within and for our said county of C — on the — day of —; then and there in our said Court to answer unto D. S. of R. within our county of H. [addition] in plea of —; to the damage of the said D. S. (as he saith) the sum of — dollars, which shall then and there be made to appear, with other due damages. And have you there this writ, with your doings therein. Witness, E. H. Esq. at P. the — day of —, in the year of our Lord —.

A. D. Clerk.

Summons when goods are attached.

[Summons when goods are attached.]

STATE OF MAINE.

SEAL. C — ss. To A. B. of B. within our county of C —, [addition]  
Greeting.

We command you that you appear at our next — Court of — to be holden at B. within and for our County of C — aforesaid, on the — day of —, then and there to answer to C. D. of R. within our county of M. [addition] in a plea of —; which plea the said C. D. hath commenced against you, to be heard and

(a) Where the remedy cannot be obtained by any writ conforming, in its outlines, to those prescribed by statute, it has been the ancient and constant practice of the court to grant a writ by which the remedy sought may be obtained. *Cooke vs. Gibbs*, 3 Mass. 196; *Wood vs. Ross*, 11 Mass. 276. See ante, p. 305, note c.

(b) Upon a plea that a writ, when served, contained no count or declaration, and that no cause of action was therein set forth, the writ was abated. *Brigham vs. Este, jr.* 2 Pick. 420.

(c) See "Act for abolition of Imprisonment of honest debtors for debt," ch. 520, Vol. 3, p. 394.



tried at the said Court; and your goods or estate are attached to the value of — dollars, for security to satisfy the judgment which the said C. D. may recover upon the aforesaid trial. Fail not of appearance at your peril. Witness, E. H. Esq. at B. the — day of —, in the year of our Lord —.

CH. 63.

A. D. Clerk.

Execution.

[Execution. (d)]  
STATE OF MAINE.

SEAL. S — ss. To the Sheriff of our county of S — or his deputy,  
Greeting.\*

Whereas C L of R within our county of S — [addition] by\* the consideration of our Justices of our — Court of —, holden at B for and within our county of S — aforesaid, on the — day of —, recovered judgment against D T of B in the county of M [addition] for the sum of — dollars and — cents debt or damage, and — dollars and — cents costs of suit as to us appears of record, whereof execution remains to be done. We command you therefore, that of the goods, chattels or lands of the said debtor within your precinct, you cause to be paid and satisfied unto the said creditor at the value thereof in money, the aforesaid sum, being — dollars and — cents in the whole, with — cents more for this writ; and thereof also to satisfy yourself for your own fees. And for want of goods, chattels or lands of the said debtor to be by him shewn unto you, or found within your precinct, to the acceptance of the said creditor to satisfy the sums aforesaid, we command you to take the body of the said debtor, and him commit unto our gaol in B. in our county of S — aforesaid, and detain in your custody within our said gaol, until he pay the full sums above mentioned with your fees, or that he be discharged by the said creditor, or otherwise by order of law. Hereof fail not, and make return of this writ with your doings therein, [here insert the time and place of return as by law prescribed.†] Witness, E. H. Esq. at B. the — day of — in the year of our Lord —.

[\*303]

[†See ante, p. 324, § 37.]

A D Clerk.

SECT. 2. *Be it further enacted*, That the writ for putting such into possession of any land or tenements as shall recover judgment for the same, and for levying the costs and damages recovered upon such suit, commonly called a writ of facias habere possessionem, and writ of fieri facias; as also the writ of scire facias, to be issued out of the Supreme Judicial Court, or Circuit Court of Common Pleas, respectively, shall be from time to time granted and issued in the form following, that is to say;

[Ib. § 2.]

[Writ of Facias Habere Possessionem, and Fieri Facias]  
STATE OF MAINE.

Hab. facias  
pos.

SEAL. S — ss. To the Sheriff of our county of S —, or his deputy, Greeting.  
Whereas A. B. of C. [addition] before our Justices of our\* — Court of —,

[\*304]

(d) 1. If the Clerk omit to affix the seal of the Court to an Execution, it may be amended, even after the execution has been extended over lands, and the extent recorded. *Sawyer vs. Baker*, 3 Glf. 29.

2. Where the judgment is in favor of *Dan Y.* and the execution is issued in favor of *Daniel Y.*, it may be amended. *Young vs. Hosmer*, 11 Mass. 90. See ante, p. 338, note g; also, *Bowdoin & ux. vs. Jordan*, 9 Mass. 160.

## CH. 63.

holden for or within our county of S. aforesaid, at B. upon the — day of —, by the consideration of our said Court, recovered judgment for his title and possession of and in a certain messuage or tenement, with the appertences, or — acres of land, with the appertences and privileges, lying and being in the town of D. against E. F. of G. [addition] who had unjustly withheld, put out or removed the said A. B. from his possession thereof; and also at the said Court recovered judgment for — dollars and — cents for costs and damages, which he sustained by reason of the same, as to us hath been made to appear of record: We command you therefore that without delay, you cause the said A. B. to have possession of and in the said messuage or tenement, or the said — acres of land, with the appertences and privileges: We also command you that of the goods, chattels or lands of the said debtor, within your precinct, at the value thereof in money, you cause the said creditor to be paid and satisfied the aforesaid sum of — dollars and — cents, which to the said creditor was adjudged for his costs and damages with — cents more for this writ, and thereof also to satisfy yourself for your own fees: and for want of such goods, chattels or lands of the said debtor, to be by him shewn unto you or found within your precinct, to the acceptance of the said creditor to satisfy the aforesaid sum: We command you to take the body of the said debtor, and him commit unto our gaol in B. in our county of S. — aforesaid, and detain in your custody within our said gaol, until he pay the full sum abovementioned with your fees: or that he be discharged by the said creditor or otherwise by order of law. Hereof fail not, and make return of this writ with your doings therein. [here insert the time and place of return as prescribed by law.] Witness, E. H. Esq. at B. the — day of — in the year of our Lord —.

A D Clerk.

Scire facias.

[Writ of Scire Facias. (e)]

STATE OF MAINE.

SEAL. S — ss. To the Sheriff of our county of S — or his deputy,  
Greeting.

[\*305]

Whereas C. D. of B. [addition] before our Justices of our\* — Court of — holden for or within our said county of S. at B. on the — day of —, in the year of our Lord —, by the consideration of our said Justices, recovered against A. B. of E. [addition] the sum of — dollars and — cents, debt or damage; and also — dollars and — cents for costs and charges by him about his suit in that behalf expended; whereof the said A. B. is convict, as to us appears of record; and although judgment be thereof rendered, yet the execution for the said debt or damage and costs doth yet remain to be made; whereof the said C D hath made application to us to provide remedy for him in that behalf: Now to the end that justice be done, we command you, that you make known unto the said A. B. that he be before our Justices of our said — Court of — to be holden within or for our said county of S. at B. on the — day of — to show cause (if any he have) wherefore the said C. D. ought not to have his execution against him the said A. B. for his debt or damage and costs aforesaid; and further to do and receive that which our said Court shall then consider; and there and then have you this writ, with your doings therein. Herein fail not. Witness, E. H. Esq. at B. the — day of — in the year of our Lord —.

A. D. Clerk.

[Ib. § 3.]

SECT. 3. *Be it further enacted*, That the several forms of writs and process here under written, shall be, and hereby

(e) Persons and property are made liable to attachment on *scire facias*, and the writ may be made accordingly, by ch. 468, vol. 3, p. 304.

are established to be the forms to be granted and used in civil causes triable before a Justice of the Peace, that is to say, CH. 63.

[Summons for appearance.]

SEAL. S— ss. To the Sheriff of the said county of S—, or either of his deputies, or the Constables of the towns within the said county, or to any or either of them,

Greeting.

In the name of the State of Maine, you are required to summon and give notice unto T P of B aforesaid, [addition] if he may be found in your precinct that he appear before me J D Esq one of the Justices of the Peace for the county aforesaid, at my dwelling house in B. on — the day of — at — of the clock in the — noon; then and there to answer to E L of M [addition] in a plea of —, to the damage of the said E L (as he saith) the sum of —\* as shall then and there appear, with other due damages. And of this writ, with your doings therein, you are to make true return unto myself, at or before the said — day of —. Dated at B. aforesaid, the — day of — in the year of our Lord —.

Summons for appearance.

[\*306]

J D

[Capias, or Attachment.]

SEAL. S— ss. To the Sheriff of the said county of S—, or either of his deputies, or the Constables of the town of B within the said county, or to any or either of them,

Greeting.

In the name of the State of Maine, you are required to attach the goods or estate of T P of B aforesaid [addition] to the value of —; and for want thereof, to take the body of the said T. P. (if he may be found in your precinct) and him safely keep, so that he may be had before me J D Esq one of the Justices of the Peace for the county aforesaid, at my dwelling house in B. on —, the — day of — at — of the clock in the — noon; then and there to answer to E. L. of M. [addition] in a plea of —; to the damage of the said E. L. (as he saith) the sum of —, as shall then and there appear, with other due damages. Hereof fail not, and make due return of this writ, and of your doings therein, unto myself, at or before the said — day of —. Dated at B. aforesaid, the — day of — in the year of our Lord —.

Capias for attachment.

J. D.

[Summons when Goods are attached.]

SEAL. S— ss. To T P of D in the county of S—, [addition]

Greeting.

In the name of the State of Maine, you are commanded to appear before me J D Esq. one of the Justices of the Peace for the County aforesaid, at my dwelling house in B on —, the — day of —, at — of the clock in the — noon, to answer unto E L of M [addition] in a plea of —; which plea the said E L hath commenced to be heard and tried before me; and your goods or estate are attached to the value of — for security to satisfy the judgment which the said E L may recover upon the aforesaid trial. Fail not of appearance at your peril. Dated at B aforesaid, the — day of —, in the year of our Lord — J D

Summons when goods are attached.

[Execution.\*]

SEAL. S— ss. To the Sheriff of our said county of S—, or either of his deputies, or the Constables of the towns within our said county, or any or either of them,

Greeting.

Whereas E L of M [addition] on the — day of — before J D Esq one of our Justices of the Peace for our county aforesaid, recovered judgment against T P of B [addition] for the sum of — debt or damage, and — dollars and — cents for charges of suit, as to us appears of record, whereof execution remains to

Execution.  
[\*307]

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be done; We command you, therefore that of the money of the said debtor, or of his goods or chattels within your precinct, at the value thereof in money, you cause to be levied paid and satisfied unto the said creditor the aforesaid sums, being — dollars and — cents, in the whole; and also that out of the money goods or chattels of the said debtor, you levy — more for this writ, together with your own fees.—And for want of such money, goods or chattels of the said debtor, to be by him shown unto you, or found within your precinct, to the acceptance of the said creditor for satisfying the aforesaid sums. We command you to take the body of the said debtor, and him commit unto our gaol in B and we command the keeper thereof accordingly to receive the said debtor into our said gaol, and him safely keep until he pay the full sums above mentioned, with your fees, or that he be discharged by the said creditor, or otherwise by order of law. Hereof fail not, and make return of this writ with your doings therein unto our said Justice, within sixty days next coming. Witness our said Justice at B the — day of — in the year of our Lord — J D

[Ib. § 4.]

SECT. 4. *Be it further enacted*, That the form of the writ of scire facias aforesaid shall be the form of a writ of scire facias upon a judgment recovered before a Justice of the Peace, mutatis mutandis.

[Mass. Stat.  
Mar. 11, 1784,  
§ 3.]

SECT. 5. *Be it further enacted*, That the writ of dower, and the writ of seizin of dower, shall be sued out in the forms following, to wit :

[\*308]

[Form\* of Writ of Dower.]

## STATE OF MAINE.

Writ of dower.

SEAL. S—— ss. To the Sheriff of our County of S—— or his deputy, Greeting. We command you that you summon — of — in our said county of S——, if — may be found in your precinct, to appear before our Justices of our Circuit Court of Common Pleas next to be holden at — within and for our said county of S——, upon the — day in — next; then and there in our said court to answer unto — of —, in a plea of dower, for that [here the declaration;] to the damage of the said — as — saith the sum of — dollars, as shall then and there appear. Witness, T N Esq. at B——, the — day of — in the year of our Lord — L M Clerk.

[Form of the Writ of Seizin of Dower.]

## STATE OF MAINE.

Writ of seizin of dower.

SEAL. S—— ss. To the Sheriff of our said county of S—— or his deputy, Greeting. Whereas — who was the wife of E D late of B in the county aforesaid, [addition] deceased, before our Justices of our — Court of — holden at B—— for our County aforesaid, on the — day of — now last past, did recover seizin against A B of B—— aforesaid [addition] of one third part of a certain messuage or tenement, with the appertinances, situate in B—— aforesaid, in the possession of the said A B [addition] as her dower of the endowment of the said E D her certain husband, by our writ of dower, whereof she hath nothing; therefore we command you, that to the said — full seizin of one third part of the aforesaid messuage or tenement with the appertinances, you cause to be had without delay, to hold to — in severalty by metes and bounds. We command you also, that of the goods or chattels of the said A B within your precinct, you cause to be paid and satisfied unto the said — at the value thereof in money, the sum of — for damages awarded her by our said Court for her being hold and kept out of her dower

aforesaid, and costs expended on this suit, with — cents more for this writ; and thereof also to satisfy yourself your own fees; and for want of goods or\* chattels of the said A B to be by him shown unto or found within your precinct to satisfy the same, we command you to take his body, and to commit him to the keeper of our gaol in B— in our county aforesaid, within the said prison, whom we likewise command to receive the said A B and him safely to keep until he pay unto the said — the full sum above mentioned, and also satisfy your fees. Hereof fail not, and make return of this writ, and how you shall have executed the same to [here insert the time and place of return as prescribed by law.] Witness, E H Esq at B the — day of — in the year of our Lord — Clerk.

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[\*309]

SECT. 6. *Be it further enacted*, That the trustee writs of attachment and execution shall be sued out in the forms following, to wit :

Trustee writs.  
[Mass. Stat.  
Feb. 23, 1795,  
§ 1.]

[Form of Trustee Writ of Attachment.]

## STATE OF MAINE.

SEAL. S— ss. To the Sheriff of our county of —, or to either of his deputies,

Greeting.

We command you to attach the goods and estate of A B of C within our county of D [addition] to the value of — dollars, and summons the said A B (if he may be found in your precinct) to appear before our Justices of our Circuit Court of Common Pleas next to be holden at — within and for our county of — on the — day of — then and there in our said Court to answer unto E F of G within our county of H [addition] in a plea of (f) —, to the damage of the said E F as he saith the sum of — dollars, which shall then and there be made to appear, with other due damages: and whereas the said E F saith that the said A B has not in his own hands and possession, goods and estate to the value of — dollars, aforesaid, which can be come at, to be attached, but has intrusted to, and deposited in the hands and possession of J K of —, [addition] trustee of the said A B, goods, effects and credits, to the said value; We command you therefore, that you summon the said J K if he may be found in your precinct to appear before our Justices of our said Court to be holden as aforesaid, to show cause (if any he have) why execution to be issued upon such judgment as the said E F may recover against the said A B in this action (if any) should not issue against his goods, effects or credits in the hands and\* possession of him the said J K; and have you there this writ, with your doings therein. Witness, I. M Esq at — the — day of — in the year of our Lord one thousand eight hundred and —

Trustee writ of  
attachment.

[\*310]

N O Clerk.

[Form of Trustee Execution.]

## STATE OF MAINE.

SEAL. S— ss. To the Sheriff of our county of —, or his deputy, Greeting. Whereas D S of R within our county of S [addition] by the consideration of our Justices of our Circuit Court of Common Pleas holden at —, within and for our county of — aforesaid, on the — day of — recovered judgment against R F of — in the county of — [addition] aforesaid, for the sum of — debt or damage (as the case may be) and — costs of suit; and whereas by the consideration of the same Court, execution was likewise awarded for the same sums against the goods, effects and credits of the said R F in the hands and possession of A B of —

Trustee execu-  
tion.

(f) In a foreign attachment, where the action was dismissed for want of a declaration, the trustee was allowed his costs. *Brown vs. Seymour & tr.* 1 Pick. 82.

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[addition] and C D of — [addition] Trustees of the said debtor, as to us appears of record, whereof execution remains to be done: We command you, therefore, that of the goods, chattels or lands of the said debtor in his own hands and possession, and of the goods, effects and credits of the said debtor in the hands and possession of the said Trustees, jointly and severally, you cause to be paid and satisfied unto the said creditor, at the value thereof in money, the aforesaid sums, being — in the whole, with — more for this writ; and thereof also to satisfy yourself for your own fees; and for want of goods, chattels or lands of the said debtor, in his own hands and possession, to be by him shown unto you, or found in your precinct, to the acceptance of the said creditor; and for want of goods, effects and credits of the said debtor in the hands and possession of the said Trustees, to be by them discovered and exposed to you, to satisfy the several sums aforesaid, with your own fees: We command you that you take the body of the said debtor, and him commit unto our gaol in — in our county of — aforesaid, and detain in your custody, within our said gaol, until he pay the full sums aforementioned, with your fees, or that he be discharged by the said creditor or otherwise\* by order of law. Hereof fail not, and make return of this writ and of your doings therein, [here insert the time and place of return as by law prescribed.] Witness W C Esq at — the — day of —, in the year of our Lord —. J S Clerk.

[\*311]

[Mass. Stat.  
May 18, 1781,  
§ 4.]

**SECT. 7.** *Be it further enacted*, That in proceedings in audita querela the writ of attachment and summons thereon, shall be in the form following, to wit:

[†See onward,  
ch. 65]

## [Form of Writ of Attachment in Audita Querela.]

## STATE OF MAINE.

**SEAL.** — ss. To the Sheriff of our county of — or his deputy, Greeting.

Writ of attach-  
ment in audita  
querela.

We command you to attach the goods or estate of A B of — to the value of — dollars, and for want thereof to take the body of the said A B if he may be found in your precinct, and him safely keep so that you have him before our Justices of our — Court — next to be holden at — within and for our county of — on the — day of — then and there in our said Court to answer unto the grievous complaint of C D of —, who complaineth and saith [here let the declaration be inserted] by all which the said C D as he saith is damaged the sum of — dollars, as shall then and there be made to appear. And have you there this writ, with your doings therein. Witness W C Esquire, at —, this — day of —, in the year of our Lord —. A H Clerk.

## [Form of Summons in Audita Querela.]

## STATE OF MAINE.

**SEAL.** — ss. To A B of —

Greeting.

Summons in  
audita querela.

[Ib. § 6.]

We command you that you appear at our — Court — next to be holden at —, within and for our county of —, on the — day of —, then and there to answer to the grievous complaint of C D of — [here recite an abstract of the declaration] which complaint is to be heard and tried at the said Court; and your goods or estate are attached to the value of — dollars to satisfy the judgment which the said C D may recover upon the aforesaid trial. Fail not of appearance at your peril. Witness, W C Esquire at — the — day of — in the year of our Lord —. A H Clerk.

[\*312]

[Ib. § 7.]

**SECT. 8\*.** *Be it further enacted*, That where the writ of audita querela shall be issued, in the form of a writ of summons, the form thereof may be as followeth:

## STATE OF MAINE.

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SEAL. — ss. To the sheriff of our county of — or his deputy. Greeting.

We command you that you summons A B of —, if he may be found in your precinct, to appear before our Justices of our — Court — next to be holden at — within and for our county of — on the — day of — then and there in our said Court to answer to the grievous complaint of C D of — who complaineth and saith [here let the declaration be inserted]; by all which the said C D as he saith, is damaged the sum of — dollars as shall then and there be made to appear. And have you there this writ with your doings therein. Witness W C Esquire at — this — day of — in the year of our Lord —. A H Clerk.

Audita querela  
in form of sum-  
mons.

SECT. 9. *Be it further enacted*, That in all proceedings in replevin, the writs in the following cases shall be in form following, to wit :

[Mass. Stat.  
June 24, 1789,  
§ 1.]

[Form of a Writ of Replevin for liberation of Cattle Impounded.]

## STATE OF MAINE.

L. s. S — ss. To the Sheriff of our County of S —, or his deputy, or to either of the Constables of the town of B in the said county, Greeting.

We command you that you replevy [here insert a description of the beast or beasts impounded] belonging to P D of B [addition] now distrained or impounded by S P of B [addition] in the common pound in said B (or in such other place as they may be restrained) and them deliver unto the said P D. Provided, the same are not taken and detained upon mesne process, warrant of distress, or upon execution, as the property of the said P D and summon the said S P to appear before J S one of our Justices of the Peace for our said county of S at his dwelling house in B on the — day of — at — of the clock in the — noon, to answer unto the said P D in a writ of replevin, for that the said S P on the — day of — at a place called A in B aforesaid,\* unlawfully took and impounded the said —, and the same unjustly detained to this day, to the damage of the said P D as he saith the sum of — dollars, as shall then and there appear with other due damages: Provided, he the said P D shall give bond, with sufficient surety or sureties to the said S P in the sum of —, being double the value of the said beasts, to prosecute his said replevin to final judgment, and to pay such damages and costs as the said S P shall recover against him, and also to return the said —, in case such shall be the final judgment. And of this writ with your doings hereon, and the bond you shall take, you are to make return to our said Justice on or before the said — day of — at — o'clock. Witness, J S our said Justice, at B in the said county, this — day of — Anno Domini —. J S

Writs of replevin for cattle impounded.

[\*313]

[Form of a Writ of Replevin for goods or chattels taken, distrained or attached, which are claimed by a third person, of the value of more than twenty dollars.]

## STATE OF MAINE.

L. s. S — ss. To the Sheriff of our county of S —, or his deputy, Greeting. [Or if the Sheriff or his deputy are defendants, then it may be directed to a Coroner.]

We command you that you replevy the goods and chattels following, viz. [here enumerate and particularly describe them] belonging to P D of B [addition] now taken, detained or attached (as the case may be) by S P of B [addition] at — in B aforesaid, and them deliver unto the said P D. Provided, the same are not taken and detained upon mesne process, warrant of distress, or upon execution, as the property of the said P D and summon the said S P that he appear before our Justices of our Circuit Court of Common Pleas (g), next to be holden at B within and for our

Writ of replevin for goods taken, &c.

[Ib. § 4.]

[See ch. 443,  
vol. 3, p. 235.]

(g) By ch. 443, vol. 3, p. 285, Justices of the Peace, and by act of Feb. 27, 1832, the Municipal Court in Portland, are invested with jurisdiction in

**CH. 63.** county of S — on the — day of — to answer unto the said P D in a plea of replevin, for that the said S P on the — day of — at said B unlawfully, and without any justifiable cause, took the goods and chattels of the said P D as aforesaid, and them unlawfully detained to this day, to the damage of the said P D as he says, the sum of — dollars: Provided, he the said P D shall give bond\* to the said S P with sufficient surety or sureties in the sum of — dollars, being twice (g) the value of the said goods and chattels, to prosecute the said replevin to final judgment, and to pay such damages and costs as the said S P shall recover against him; and also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment; and have you there this writ, with your doings herein, together with the bond you shall take. Witness S N Esq at B this — day of — Anno Domini —.

E P Clerk.

[Form of Writ of Restitution on Judgment rendered before a Justice of the Peace.]

STATE OF MAINE.

**Writ of restitution from a Justice of Peace.**  
**[Ib. § 6.]**  
**[\*315]**

L. s. S — ss. To the Sheriff of our county of S —, or his deputy, Greeting.

Whereas P D of B in our county of S [addition] lately replevied the beasts following: [Here insert such description of them as they had in the writ of replevin] which S P of B in our county of S — [addition] had unlawfully taken and unjustly detained, as the said P D suggested, and caused the said S P to be summoned before J S one of our Justices of the Peace, for our said county of S to answer unto the said P D for such supposed unlawful taking and detaining, at a day now passed: and whereas upon the — day of — at B aforesaid, upon a hearing of the cause of taking and detaining the said beasts, before our said Justice, it appeared that the same taking and detaining was lawful and justifiable; Whereupon it was then and there considered, that the same beasts be returned, and restored to the said S P irrepleviable, and that the said S P recover against the said P D the sum of — damages, for his taking the same by the said process of replevin, and the further sum of — for his costs, arisen in the defence of the said suit, as by the record of our said Justice, before him remaining to us appears; whereof execution remains to be done: We command you therefore, that you forthwith return and restore the same beasts unto the said S P. And also that of the money of the said P D or of his goods or chattels within your precinct, at the value thereof in money you\* cause to be levied, paid and satisfied unto the said creditor the aforesaid sums, being — in the whole, with — cents more for this writ, together with your own fees; and for want of such money, goods or chattels of the said debtor to be by him shown unto you or found within your precinct, to the acceptance of the said creditor for satisfying the aforesaid sums; We command you to take the body of the said debtor, and him commit unto our gaol in B and we command the keeper thereof accordingly, to receive the said debtor into our said gaol, and him safely to keep, until he pay the full sums above mentioned, with your fees, or that he be discharged by the said creditor, or otherwise by order of law. Hereof fail not, and make return of this writ, with your doings there-

actions of replevin where the value of the goods in dispute does not exceed twenty dollars.

(h) 1. It is no sufficient ground to quash a writ of replevin, that the officer has taken bond for a larger sum than the writ directed. *Clap vs. Guild*, 8 Mass. 153.

2. Where the bond was executed by the surety before the service of the writ, but not by the principal until after the return of the writ and the entry of the action, it was holden good in an action upon it. *Cady vs. Eggleston & al.* 282.



in, unto our said Justice, within sixty days next coming. Witness our said Justice at B the — the day of — in the year of our Lord —. J S CH. 63.  
[Form of Writ of Withernam.]

STATE OF MAINE.

L. s. S — ss. To the Sheriff of our county of S —, or his deputy, Greeting.  
Whereas P D of B in our county of S [addition] lately replevied the beasts following, viz. [here insert such description of them as they had in the writ of replevin] and which were at the time of the replevy, of the value of — which S P of B aforesaid had unlawfully taken and detained, as the said P D suggested, and caused the said S. P. to be summoned before J S one of our Justices of the Peace, for our said county of S to answer unto the said P D for such supposed unlawful taking and detaining, at a day now passed; and whereas upon the — day of — at B aforesaid, upon a hearing of the cause of taking and detaining the said beasts, by our said Justice, it was determined, that the same taking and detaining, was lawful and justifiable: Whereupon it was then and there considered, that the beasts be returned and restored to the said S P irrepleviable, and for his damages and costs; and afterwards on the — day of — our writ of return and restitution issued, in due form of law, directed to the Sheriff of our said county of S or his deputy, to return the same accordingly; which writ of return and restitution was delivered to C D to\* execute accordingly; who on the — day of — returned thereon, [here insert the return made by the officer, of his inability to return the beast.] And we being desirous that the said P D should not, by his false suggestions and pretensions any longer detain the beasts so by him replevied as aforesaid, command you forthwith to take the beasts of the said P D of like kind and value, if any he hath to be found in your precinct, in withernam, and in default thereof any other of his goods and chattels to the full value, in withernam, and them deliver unto the said S P to be by him kept, used and improved, until the said P D shall restore him the beasts he took from him, by our writ of replevin, as aforesaid; and also that of the money of the said P D or of his goods or chattels to be found within your precinct, at the value thereof in money, you cause to be paid and satisfied unto the said S P — for this writ together with your own fees for executing the same. Hereof fail not, and make return of this writ, with your doings herein, unto our said Justice, within sixty days next coming. Witness, our said Justice at B the — day of — in the year of our Lord —. J S [\*316]

SECT. 10. *Be it further enacted*, That the form of the writ for the replevying of a person, and of original and alias writs of Withernam shall be as follows, to wit : [Mass. Stat. Feb. 19, 1787, § 1.]

[Replevying a person.]

[Form of the original Writ where any person stands committed by lawful authority.]

STATE OF MAINE.

L. s. S — ss. To the Sheriff (i) of our county of S —, Greeting.  
We command you, that justly and without delay, you cause to be replevied C D who (as it is said) is taken and detained in our gaol in N within our said county of S by the commitment of A B that he the said C D may be at our Supreme Judicial Court, next to be holden at — within our county aforesaid, upon the — day of — next, then and there in our said Court to answer to all such things as shall be then and there objected against him, more especially for the offence for Writ for replevying a person lawfully committed.

(i) This writ can be served by the Sheriff only, or by the coroner when the Sheriff is a party, but in no case by a deputy Sheriff. Wood, Jun. v. Ross, 11 Mass. 271.

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which he stands committed, unless, while the writ of habeas corpus is suspended by the\* Legislature, he stands committed by the Supreme Executive Power of the State, as dangerous to the public safety, or by the same or some subordinate authority of the government, for treason, the death of man, counterfeiting the common currency, house burning, burglary, robbery or some other offence whereof if he is convicted, he may suffer death or banishment; or unless he is holden under execution upon judgment for debt, forfeiture or in withernam, or by distress for taxes, or under sentence after conviction, for fine, or costs, or in punishment. Witness, W C Esq at — the — day of — in the year of our Lord —. L M Clerk.

And where the plaintiff is held without order of law, the writ shall be in form following, viz.

## STATE OF MAINE.

L. s. S — ss. To the Sheriff of our county of S —, Greeting.

Writ for replevying a person committed without order of Law.

We command you that justly and without delay you cause to be replevied C D who (as it is said) is taken and detained in a place called N within our said county of S by the duress of G H that he the said C D may appear at our Circuit Court of Common Pleas, next to be holden at — within and for our said county of S upon the — day of — next, then and there in our said Court to demand right and justice against the said G H for the duress and imprisonment aforesaid, and to prosecute his replevin as the law directs. Provided, that if he, the said C D is held by the said G H as his ward, infant, or one to whose service he is entitled, or as a principal to whom the said G H is bail, and he shall make you secure by good and lawful mainpernors for his appearing at our Court aforesaid to prosecute his replevin against the said G H and to have his body at the same Court, ready to be re-delivered if ordered thereunto, and to pay all such damages and costs, as shall be then and there awarded against him; then and not otherwise you are to deliver him; and if the said C D is by you delivered at any day before the sitting of our said Court, you are to summon the said G H by serving him with an attested copy of this writ, that he may appear at our said Court, to answer unto the said C D upon his replevin. Witness,\* T N Esq at B the — day of — in the year of our Lord —. X Y Clerk.

[\*318]

[Original Writ of Withernam.]

## STATE OF MAINE.

L. s. S — ss. To the Sheriff of our county of S —, Greeting.

[Ib. § 5.]

Whereas we have heretofore, by our writ for replevying a person, commanded you that justly and without delay [here the original writ for replevying a person shall be recited] and you having returned thereupon [here the Sheriff's return shall be recited.] We therefore command you that without delay you take the body of the said G H if he may be found in your precinct, and him safely keep, so that he may be at our Circuit Court of Common Pleas, next to be holden at — within and for our said county of S on the — day of — next, then and there in our said Court to traverse the return aforesaid upon our original writ for replevying a person, and that if he shall be found guilty of the elongation of the said C D he may be held by our alias writ of withernam, until he shall produce the body of the said C D that he may be delivered as the law directs. Witness, T N Esq at B the — day of — in the year of our Lord —. X Y Clerk.

And the alias Writ of Withernam shall be in form following, viz.

## STATE OF MAINE.

L. s. S — ss. To the Sheriff of our county of S —, Greeting.

Withernam.

Whereas we commanded you, by our original writ for the replevying of a person that [here the original writ for replevying a person shall be recited] upon which

writ a return was made, that [here the return shall be recited] whereupon our writ of withernam was duly issued commanding you that [here the writ of withernam shall be recited] and at our said Court the said G H [here all the consequent proceedings shall be recited] whereupon it was considered and adjudged by our said Court, that the body of the said G H should be taken and held, until he shall produce the body of the said C D and until he shall pay the sum of ——— taxed in costs against him. We therefore command you, that you take the body of the said G H into your custody, and\* him there to hold irrepleviably in one of our gaols in our said county of S—— until he shall produce the body of the said C D or is discharged by order of law. Witness, ——— Esq at B the ——— day of ——— in the year of our Lord ———.

Clerk.

SECT. 11. *Be it further enacted*, That in all civil causes, pending in any Court, the subpoena to witnesses shall be in the form following, to wit :

[Subpœna for Witnesses.]

S—— ss. To A B of C [addition]

Greeting.

You are hereby required in the name of the State of Maine, to make your appearance before the Justices of the ——— next to be holden at B within and for the county of S on the ——— day of ——— to give evidence of what you know relating to an action or plea of ——— then and there to be heard and tried betwixt A B of C [addition] plaintiff, and D E of E [addition] defendant. Hereof fail not, as you will answer your default under the pains and penalty in the law in that behalf made and provided. Dated at B the ——— day of ———, in the year of our Lord ———.

A D Clerk.

Subpœna for witnesses.

SECT. 12. *Be it further enacted*, That in all proceedings in forcible entry and detainer, the warrant to summon a jury, the summons to the party complained against, and the writ of restitution shall be in the forms following, to wit :

[Forcible Entry and Detainer.]

[Form of Warrant to Sheriff to summon a Jury.]

STATE OF MAINE.

L. s. S—— ss. To the Sheriff of the county of S——,

Greeting.

Whereas complaint is made to us the subscribers, two of the Justices of the Peace for and within the county of S quorum unus, by A B of D in the same county, gentleman, that E F of ——— yeoman, upon the ——— day of ——— at D aforesaid, with force and arms, and with a strong hand, did unlawfully and forcibly enter into and upon a tract of land of him the said A B at D aforesaid, containing ——— acres bounded as follows, viz. (or into the messuage or tenement of him the said A B as the case may be) and him the said A B with force and a strong hand as aforesaid, did expel\* and unlawfully put out of the possession of the same, [or if it is a forcible detainer only, then the entry shall be described and the detainer inserted as follows:] and him the said A B does unlawfully, unjustly, and with a strong hand, deforce and still keep out of the possession of the same. You are therefore commanded in behalf of the said State, to cause to come before us upon the ——— day of ——— at ———, in the said county twelve good and lawful men of our county each one of whom having a freehold of the yearly value of five dollars to be empannelled and sworn to inquire into the forcible entry and detainer (or the


Form of warrant to summon a Jury in forcible entry and detainer.

[\*320]

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CH. 63.  detainer) afore described. Given under our hands and seals the — day of — in the year of our Lord —.

R S } Justices of the Peace,
N O } quorum unus.

[Forcible Entry and Detainer.]

[Form of Summons to the party complained against.]

STATE OF MAINE.

Summons to
the party com-
plained against

L. s. S— ss. To the Sheriff of our county of S—, Greeting.
We command you that you summon E F of — to appear before the subscribers, two of our Justices of the Peace, within and for our said county of S— quorum unus, at a place called — in D— in the said county, at — o'clock in the — noon, then and there to answer to, and defend against the complaint of A B to them exhibited, wherein he complains that [here the complaint shall be recited] and you are to make a return of this writ, with your doings therein unto our said Justices, upon or before the said day. Witnesses, our said Justices, the — day of — in the year of our Lord —.

N O
R S

[Forcible Entry and Detainer.]

[Form of Writ of Restitution.]

STATE OF MAINE.

Writ of resti-
tution.

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L. s. S— ss. To the Sheriff of our county of S—, Greeting.
Whereas at a Court of Inquiry of forcible entry and detainer, held at D in our county of S upon the — day of — in the year of our Lord —, before R S and N O Esquires, two Justices of the Peace for our said county of S quorum unus, the Jurors empannelled and* sworn by our said Justices, did return their verdict in writing signed by each of them, that A B was upon the — day of — in the rightful possession of a certain messuage or tract of land [as in the verdict returned] and that &c. [as in the verdict] whereupon it was considered by our said Justices, that the said A B should have restitution of the same. We therefore command you, that taking with you the force of the county, if necessary, you cause the said E F to be forthwith removed from the premises, and the said A B to have the peaceable restitution of the same; and also that you levy of the goods, chattels or lands of the said E F the sum of — being costs taxed against him on the trial aforesaid, together with — cents more for this writ and your own fees, and for want of such goods, chattels or lands of the said E F by you found, you are commanded to take the body of the said E F and him commit to our gaol in L in our said county of S there to remain until he shall pay the sum aforesaid, together with all fees arising on the service of this writ, or until he is delivered by order of law, and make return of this writ, with your doings therein, within twenty days next coming. Witness, our said Justices, at D aforesaid, the — day of — in the year of our Lord —.

R S
N O

[Approved March 19, 1821.]

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AN ACT directing the Process in Habeas Corpus.

WHEREAS the writ commonly called the Writ of Habeas Corpus is a writ of right to which the citizens of this State, by the constitution and the law of the land are at all times entitled, to obtain relief from every wrongful imprisonment, or unlawful restraint of personal liberty:

Preamble.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That any person imprisoned in any common gaol, or otherwise restrained of his personal liberty by any officer or officers, or any other person or persons for any cause or upon any pretence whatever, he, or any (a) person in his behalf, may complain, in writing, to* the Supreme Judicial Court of this State, or to any one Judge of said Court, in term time in any county, or to any one or more of the Judges thereof in the vacation time of the said Court; and upon such complaint, and upon view of the copy of the warrant, (if any there be,) by which such person stands committed, or upon his affidavit certified by a Justice of the Peace, or on the oath of the person applying on his behalf, or any other credible witness, or upon the affi-

Who are entitled to writ of habeas corpus, and mode of applying for it.

[Mass. Stat. Mar. 16, 1785, § 1.]

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(a) 1. If a minor is withheld from his parents or guardians against their will, the court will put him at liberty from such restraint, although the minor may not wish it. *Com. vs. Harrison*, 11 Mass. 65.

2. Where a female child, between eleven and twelve years of age, whose father was dead, was committed by her mother to the respondent, a member of the society of Shakers, on a verbal contract for her support and education, and afterwards a guardian was appointed who claimed the custody of the child, and obtained a writ of *habeas corpus* directed to the respondent, the court refused to determine in this summary process, upon the rights of the mother and of the guardian, and ordered that the child might remain with the respondent or go at large, at her election. *Com. vs. Hammond*, 10 Pick. 274.

3. A husband and wife having separated, pursuant to articles previously entered into, in which he had stipulated that in the event of such separation the children should remain with her; the court, on *habeas corpus* sued out at his request, ordered the children into the custody of the mother, pursuant to the articles of separation; she living with her father, and they being of an age to require her care. *State vs. Smith*, 6 Glf. 462.

4. Independent of such articles, the court in such cases, will exercise its sound discretion, the father having no vested right, in any case, to the exclusive custody of his children. *Id.*

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Sep. J. Court,
or any Judge
thereof may
grant the writ,

returnable to
said Court or
any Judge
thereof.

Persons confi-
ned for certain
offences, &c.,
not allowed the
writ.

[†Riley's case,
2 Pick. 172;
Cutting & ux.
vs. Rockwood.
ib. 444.]

But said Court
or Judge may
bail for any of-
fence, special
cases excepted.

Form of writs
to be issued in
different cases.

[Ib. § 2.]

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davit of such witness, certified as aforesaid, if he lives more than twenty miles from the Court or Judge applied to, that a copy of such warrant has been demanded and denied; the said Court or Judge in term time, and the said Judge in the vacation, hereby are respectively authorized and required to award a writ of habeas corpus, directed to the officer or person imprisoning or restraining the complainant, returnable forthwith to such Court or Judge who awarded the same, or to any other Judge of said Court; except the complaint be in favour of persons committed for treason or felony, or for suspicion thereof, or as accessory to the latter before the fact, plainly and specially expressed in the warrant of commitment, or persons convict or in execution by legal process, criminal or civil,† or committed by mesne process in any civil action for want of reasonable bail, and persons with regard to whom the benefit of the said writ shall be suspended by the Legislature agreeably to the Constitution: *Provided*, That nothing in this act contained shall be construed to hinder or restrain the said Supreme Judicial Court, in term time, or any one or more Judges thereof, in the vacation, from bailing any person wherever and for whatever offence committed, at their discretion, whenever the circumstances of the case shall appear to require it; persons committed by the Governor and Council, Senate or House of Representatives, agreeably to, and for the causes mentioned in the Constitution, always excepted.

SECT. 2. *Be it further enacted*, That such writ, when awarded by the said Court, shall be signed by the Clerk, tested by the first Justice who is not party thereto, and sealed with the seal thereof; but when awarded by any Judge, in the vacation, shall only be under the hand and seal of *such* Judge, and shall direct the place to which the complainant* shall be brought; and the form of such writ when awarded by the Supreme Judicial Court, shall be as follows, viz.

STATE OF MAINE.

(I. s.) S—— ss. To ——,

Greeting.

We command you that the body of A B of ——, in our prison, under your custody [or by you imprisoned and restrained of his liberty, as the case may be] as it is said, together with the day and cause of his taking and detaining, by whatsoever name the said A B shall be called or charged, you have before our Justices of our Supreme Judicial Court, holden at B—— within and for the county of S—— immediately after the receipt of this writ, to do and receive what our said Justices

shall then and there consider concerning him (or her) in this behalf, and have there this writ. Witness, ———, Esq at B this ——— day of ——— in the year of our Lord ———.

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And the like form shall be used by the Judge, *mutatis mutandis*, when such writ shall be awarded by him.

SECT. 3. *Be it further enacted*, That when any person shall bring and offer such writ of habeas corpus to the officer or person to whom the same shall be directed, he shall receive the same ; and upon payment or tender of such charges for bringing the complainant from the place of imprisonment, as the Court or Judge who grants the writ shall order, if the person complaining be confined in a common gaol, or under the custody of an officer, otherwise without such payment or tender, to the place mentioned in the writ, such officer or person shall have the body of the complainant before the Court or Judge before whom the writ is made returnable, (unless committed and detained for some one or more of the causes aforesaid,) at the place therein mentioned within three days, if within twenty miles from the place of imprisonment ; if more than twenty but within one hundred miles, then within ten days ; if above one hundred miles, then within twenty days after the receipt thereof and shall then return the same, and certify thereon the true and all the cause or causes of his or her taking and detaining.

Duty of those to whom the writ is directed and nature of the return to be made.

[Ib. § 3.]

SECT. 4. *Be it further enacted*, That if after the awarding of such writ by any Judge of the said Supreme Judicial Court,* in the vacation, but before the return thereof, the said Court shall sit in any county, the said writ, with the body of the complainant and causes of taking and detaining, may be returned, had and certified to the said Court by the Judge who awarded the same ; but if after awarding such writ by the said Court, in term time but before the return thereof, the said Court shall rise, or be adjourned, the same, with the body of the complainant, and causes of taking and detaining, shall be returned, had and certified before some Judge of the said Supreme Judicial Court.

[*324] In certain cases if writ be made returnable before a Judge it may be returned to the Court; and vice versa in case of adjournment of Court.

[Ib. § 4.]

SECT. 5. *Be it further enacted*, That when any person shall be brought by writ of habeas corpus as aforesaid before the said Court, or any Judge thereof, such Court or Judge shall within three days after proceed to examine the said

On return of the writ, Court or Judge must, within 3 days, proceed to examine, &c.

CH. 64. causes ; and if committed for an offence or cause bailable by law, they shall bail him by recognizing him with sufficient surety or sureties in a reasonable sum having regard to his quality and circumstances, and the nature of the offence, to appear at such Court as shall have cognizance of the offence ; and shall certify the recognizance into such Court ; if committed upon mesne process in any civil action for want of bail and the bail required shall appear excessive, it shall be ascertained what bail is reasonable, and he shall be discharged on giving the same ; but if it shall appear that the complainant is imprisoned or restrained without due order of law, or sufficient cause, he shall be discharged from such commitment or restraint.

and bail or
commit, as case
may require.

[Ib. § 5.]

Penalty, if officer do not deliver his prisoner in 6 hours, a copy of warrant, &c. by which he is holden.

[Ib. § 6.]

If any minor be enlisted into U. S. army without consent of parents, &c. any judge of S. J. Court or C. C. Court. Pleas shall issue habeas corpus on application therefor.

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[Mass. Stat. Feb. 27, 1815, § 3.]

Proceedings to be had on such writ.

[Ib. § 4]

SECT. 6. *Be it further enacted (b),* That if any officer, in whose custody any prisoner shall be, shall not within six hours after demand made, deliver such prisoner a true copy of the warrant or process by which he stands committed, such officer shall forfeit to the party grieved, the sum of two hundred dollars.

SECT. 7. *Be it further enacted,* That if any minor, under the age of twenty-one years shall be hereafter enlisted within this State, into the army of the United States without the consent in writing, of his parent, guardian or master, either of the Justices of the Supreme Judicial Court, or of the Circuit Court of Common Pleas, are hereby respectively authorized and required on application therefor, to award a writ* of habeas corpus returnable forthwith, directed to the officer or person restraining such minor ; and such Justice or Judge is hereby authorized and required, after a full hearing of the parties who shall appear before him, to discharge such minor so enlisted.

SECT. 8. *Be it further enacted,* That the Justice or Judge aforesaid is hereby authorized and empowered to inquire into the causes of the imprisonment or restraint of any person brought before him, on such writ of habeas corpus,

(b) This section applies only to cases in which the commitment is by warrant or process, a copy of which must be left with the Sheriff to oblige him to receive the prisoner, and not to cases where no warrant or process need be shewn to the Sheriff. *Randall vs. Bridge*, 2 Mass. 552.

the return of the officer or person on said writ to the contrary notwithstanding (c).

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SECT. 9. *Be it further enacted*, That if any officer or person, to whom any writ of habeas corpus shall be directed shall refuse to receive the same, or, after receipt thereof, shall refuse or neglect to yield such obedience thereto as this act requires (the complainant performing the conditions required) unless prevented by the sickness of the prisoner, or other necessity, he, for such refusal or neglect, in each and every particular shall forfeit to the party grieved the sum of four hundred dollars; and for any false return to such writ shall be further liable to the action of the party.

Penalty against person to whom the writ is directed, for not receiving and obeying it—or making a false return.

[Mass. Stat. Mar. 16, 1795, § 7.]

SECT. 10. *Be it further enacted*, That the Court or Judge respectively may further punish every disobedience to such writs as for a contempt, and compel obedience thereto, by process of attachment. And in order to prevent any attempts that might be made to deprive any prisoner of the benefit of this habeas corpus, by shifting the custody of such prisoner from one prison or officer to another or sending him away :

Court or Judge may further punish disobedience to such writ as a contempt.

[Ib. § 8.]

SECT. 11. *Be it further enacted*, That every person duly ordered to be committed for any criminal or supposed criminal matter, shall be carried as soon as may be, and confined in some common gaol and not elsewhere, (except persons sent to the work house or house of correction for due cause) and shall not be delivered from one officer to another, except for the more easy and speedy conveyance of the prisoner to such gaol, nor be removed, without his consent from one county to another unless by habeas corpus, or some other legal writ under the penalty of forfeiting for every* offence to the party grieved, the sum of four hundred dollars.

Persons, ordered to be committed, to be carried to common gaol, &c. soon as may be—and not confined elsewhere except—

[Ib. § 9.]

Penalty for removing prisoners, &c. without habeas corpus.

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SECT. 12. *Be it further enacted*, That no person enlarged by habeas corpus shall be again imprisoned or restrained of his liberty for the same cause, unless he shall be in-

No person discharged to be again restrained for same

(c) Upon a return that the party was not in the custody of the respondent, the court refused to hear evidence that the party was a minor, and had enlisted into the army, on which it was desired that an order might pass declaring the restraint unlawful. *Com. vs. Chandler*, 11 Mass. 88.

CH. 65. dicted therefor, or convicted thereof, or shall neglect to find bail when ordered thereunto by some Court of record : *Provided*, That no penalty established by this act shall be construed to bar any action at common law for false imprisonment or unlawful restraint : and when any person shall be unlawfully carried out of the State, or imprisoned in a secret place, any other person shall be permitted to appear for him in any action brought in his name : *Provided*, Such person shall stipulate for the payment of costs as the Court shall direct. [Approved February 27, 1821.]

cause, unless, &c.
[Ib. § 12.]
No penalty to prevent recovery at common law.

Any other person may appear for one secreted, securing costs.

Chapter 65.

AN ACT relating to the Writ of Audita Querela, and the proceedings thereupon.

Audita querela, how and from what Courts to be issued.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That in all cases where by law a writ of audita querela (a) lieth, the same may be sued out in the form of a writ of attachment, or a writ of summons, at the election of the complainant : and in all cases

(a) 1. This writ may be sustained in cases where there is another remedy. *Lovejoy vs. Webber*, 10 Mass. 103.

2. But it does not lie where the party has had time and opportunity to take advantage of the matter which discharges him, and has neglected it. *Ib.*

3. Yet it lies where a man satisfies a judgment, and is afterwards taken in execution. *Ib*; *Brackett vs. Winslow & al.* 17 Mass. 153.

4. It seems such writ must contain an allegation of fraud and deceit, and the case be one where legal process has been abused, and injuriously employed, to purposes of fraud and oppression. *Little vs. Newburyport Bank*, 14 Mass. 443.

5. It may be sustained to prevent or recal an execution upon some ground which occurred after the rendition of judgment; if the debtor had no opportunity to plead it to the action, or to give it in evidence. *Johnson vs. Harvey*, 4 Mass. 483; *Thatcher & al. vs. Gammon*, 12 Mass. 270.

6. If judgment be rendered upon the award of referees, and the party, in whose favor the award is, should sue out an execution, contrary to the manifest intent of the referees, a remedy might be had by his process. *Skilling vs. Coolidge & al.* 14 Mass. 43.

where the said writ is brought to set aside or annul any proceedings had upon a writ of execution, the said writ of audita querela shall be sued out of and be returnable to the Court to which the said writ of execution was returnable : and in all other cases the said writ shall be sued out of and be returnable to the Circuit Court of Common Pleas to be holden in such county whereof one of the parties thereto is an inhabitant or resident, unless where the complainant is not an inhabitant or resident within this State ; and in such case the said writ may be sued out of and returnable to any Circuit Court of Common Pleas within this State, at the election of the complainant.

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[Mass. Stat.
May 18, 1781,
§ 1.]

SECT. 2. *Be it further enacted*, That in all cases the said writ of audita querela shall be under the seal of the Court out of which the same shall issue signed by the Clerk thereof, and tested by the first Justice who is not a party to the same ;* and the said writ before the service thereof shall be endorsed by one or more of the complainants, or by his or their attorney, by writing his or their names on the back thereof towards the bottom ; and such endorser shall be liable to pay to the respondent such cost as he shall have final judgment for, in that suit, to be recovered by action of debt.

Form of writ.

[Ib. § 2.]

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To be endorsed.

SECT. 3. *Be it further enacted*, That the said writ of audita querela may be served upon the adverse party in the same manner as writs of attachment or scire facias are directed by law to be served ; and upon default of the respondent after such service without appearance, the Court may proceed to hear and try the same suit, and thereupon to proceed to final judgment and execution, in the same manner as by law they are authorized when the respondent after appearance becomes defaulted. And in all cases after the said writ is returned served as aforesaid, the Court, in which the suit thereupon is pending, shall have full power to hear and try the said cause, and thereupon to proceed to judgment and execution according as to law and justice doth appertain.

Mode of service.

[Ib. § 3.]

SECT. 4. *Be it further enacted*, That where the said writ of audita querela shall be issued in the form of a writ of attachment with summons, or by original summons, they shall be in form prescribed by law.

When issued as
writ of attachment—form.
[See ante, p.
390.]

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Power and duty of officer.

[Ib. § 5.]

SECT. 5. *Be it further enacted*, That the officer to whom such writ of attachment is directed, shall have the same power and authority and be under the same obligations by virtue of said writ, to attach the body of the respondent or his goods, or estate, as he hath or is under by virtue of any other writ of attachment sued out pursuant to the laws of this State and to him directed ; and in the same manner and under the same restrictions and regulations, as are by law provided in other cases, the body of the respondent shall be holden to bail and the goods or estate so attached be liable to be taken in execution.

Damages may be recovered in certain cases.

[Ib. § 9.]

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SECT. 6. *Be it further enacted*, That where the complainant in any writ of audita querela may, by other subsequent action at law, recover of the respondent any recompense in damages or otherwise, for the wrongs done him by the service of* such execution for the setting aside and annulling of the proceedings upon which the said writ of audita querela is brought, in all such cases the complainant may have the same remedy upon his writ of audita querela and in his declaration therein may declare for the same recompense in damages or otherwise, and judgment shall be rendered and execution issue thereupon accordingly.

Form of pleadings.

[Ib. § 10.]

SECT. 7. *Be it further enacted*, That the general issue in all actions prosecuted on writs of audita querela may be the plea of not guilty ; and upon such plea being duly pleaded by the respondent, either party may give any special matter in evidence by which the truth and justice of the cause may be known : *Provided nevertheless*, That the respondent may plead any special matter in bar or the said general issue at his election.

Appeal allowed from C. C. C. Pleas to S. J. Court.

[Ib. § 11.]

SECT. 8. *Be it further enacted*, That in cases where the writ of audita querela is returnable to the Circuit Court of Common Pleas in any county within this State, and judgment given in said Court, the party aggrieved thereat may appeal to the Supreme Judicial Court of this State, next to be holden within the same county, the said appeal to be granted and prosecuted under the same regulations and restrictions as appeals in other actions from the judgment of any Circuit Court of Common Pleas, are to be granted and prosecuted ; and

when the appellant shall fail to prosecute his appeal with effect, the Supreme Judicial Court may upon complaint filed by the appellee affirm the judgment rendered by the Circuit Court of Common Pleas with additional damages and costs, and award execution accordingly.

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SECT. 9. *Be it further enacted*, That in cases where the complainant in such writ of audita querela is in gaol by virtue only of such execution, the Court to which such writ is returnable, or the Supreme Judicial Court upon the appeal may at their discretion, according to the circumstances of the case, enlarge and liberate the complainant from gaol and admit him to bail, upon his sureties (being sufficient freeholders within the State to be approved of by the Court,) giving bond, together with the complainant jointly and severally to the respondent, in such penalty as shall be directed* by the Court, conditioned, if final judgment be rendered for the respondent, that the complainant shall within thirty days after the entering such final judgment, surrender himself to the gaol keeper to be detained in custody under the same execution, or within that time satisfy the same execution, and also such final judgment as shall be rendered as aforesaid for the respondent. And if the said complainant shall surrender himself to the gaol keeper as aforesaid, he shall be in custody under said execution, as fully and to all intents and purposes as if the said writ of audita querela had not been brought nor the said complainant admitted to bail. [Approved January 23, 1821.]

Court may liberate plaintiff, from prison, on certain conditions.

[Ib. § 12.]

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Chapter 66.


AN ACT establishing the Right to the Writ for replevying a person.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That every person within this State, who shall be imprisoned, confined, or held in duress (a), shall be entitled as of right, to the writ for re-

Who are entitled to the writ.

[Mass. Stat. Feb. 19, 1787, § 1.]

(a) 1. An infant, in the keeping of the mother, is not in duress, within the meaning of this Statute. *Wright vs. Wright*, 2 Mass. 110.

CH. 66.  plevying a person, and to be thereby delivered ; unless, while the writ of habeas corpus is suspended by the Legislature, he shall stand committed by the special order of the Supreme Executive Power of the State as dangerous to the public safety, or by the same, or by some subordinate authority of the government, for treason, the death of man, counterfeiting the common currency, house burning, burglary, robbery, or some other offence, for which if he is convicted, he may suffer death or banishment, or unless he is held in execution upon judgment of debt, forfeiture, withernam, or by distress for taxes, or under sentence after conviction, for fine, costs or in punishment. And where any person stands committed by lawful authority for any crime for which he may not suffer death, or otherwise than is above in this act specified, the writ shall be in form prescribed by law.

Writ in certain cases to issue from S. J. Court—

[Ib. § 2.]

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in others, from C. C. C. Pleas.

Proceedings in S. J. Court.

Proceedings in C. C. C. Pleas.

SECT. 2. *Be it further enacted,* That if the plaintiff stands committed for any crime not before in this act mentioned, or for any other offence, whereof if he is convicted, he may not have sentence of death or banishment thereof passed upon* him, he shall have his writ from the Clerk of the Supreme Judicial Court fourteen days before the return day of the same ; and the same writ shall be made returnable in the same county where the imprisonment happens, and unto the next Supreme Judicial Court, to be there holden : but if he is held by any person without due order of law, he shall have his writ from the Clerk of the Circuit Court of Common Pleas of the county wherein he is held returnable, fourteen days at the least from the day of the date ; and where the plaintiff is delivered by a writ returnable into the Supreme Judicial Court, having been committed for any offence, and from which commitment he is replevisable, he shall, before he is delivered, recognise before the Sheriff of the county, in person, with sufficient surety or sureties in a reasonable sum for his appearance at the same Court, to answer, abide and perform the order and sentence of the same ; which recognisance shall be returned into Court by the Sheriff ; and when the plaintiff shall be delivered by a writ returnable into

2. The mother of a bastard child is entitled to the custody of it against the putative father. *Ib.* See ante, p. 397, note a.

the Circuit Court of Common Pleas, he shall before his deliverance give bond to the use of the defendant with sufficient surety or sureties, at the discretion of the Sheriff, to appear at the Court to which the writ is returnable; and there to prosecute his replevin against the defendant, to have his body there ready to be re-delivered, as the Court shall order, and to pay all damages and costs that may be awarded against him; and the Sheriff shall be answerable, if the sureties shall prove insufficient, unless they are such as the defendant agrees to.

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SECT. 3. *Be it further enacted*, That if the plaintiff shall not prosecute, or in prosecuting, shall be unable to support his replevin, then the defendant shall recover his reasonable costs; and if it shall be found, upon the trial, that the plaintiff is the ward or infant of the defendant, or that he the said defendant is entitled to the service of the plaintiff, or that the defendant is bail to the plaintiff, then the defendant shall have judgment (b) against the plaintiff for a re-delivery of his body and for such damages as the Jury shall assess against the plaintiff, with reasonable costs.

In what cases the plaintiff shall not be set at liberty.

[Ib. § 3.]

SECT. 4. *Be it further enacted*, That if the Sheriff shall return upon the writ, for replevying a person, issuing from the* Circuit Court of Common Pleas, that the defendant hath elained the plaintiff's body, so that he cannot deliver him, then the plaintiff shall on motion to the Court, have a capias in withernam to take the defendant's body, and to keep the same until he shall produce the plaintiff to be delivered according to the commandment of the original writ: *Provided nevertheless*, That if the defendant shall give full and sufficient bail for his appearance at the Court whereunto the writ is returnable, then and there to traverse the return of the Sheriff upon the writ for replevying a person, that the Sheriff shall take such bail; or if the defendant cannot procure such bail, and is thereupon committed by the Sheriff, he may nevertheless at the next term (and not afterwards) be allowed to traverse the Sheriff's return of elongation, or to plead any matter

If Sheriff return that defendant has elained plaintiff's body—what proceedings shall be had. [*331]

[Ib. § 4.]

(b) An appeal lies to this court, from judgments of the Common Pleas, rendered upon writs *de homine replegiando*. *Wood Jr. vs. Ross*, 11 Mass. 271.

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of justification in the same manner as he might have done to the original replevin : and if the Jury shall not find that he is guilty of eloining the plaintiff as set forth in the return, or if they find that the justification is supported, the defendant shall be allowed his costs against the plaintiff ; but if the defendant will not traverse the return, and put himself upon the county ; or if upon traversing the same, he shall be found guilty of the elongation of the plaintiff ; or if upon pleading a justification, he shall not support the same, then the Court shall order him into the custody of the Sheriff, and shall issue an alias writ of withernam to hold him, until he shall produce the body of the plaintiff, or until he can prove that the plaintiff is dead ; which fact may be tried at any term of the same Court, and in the same county, by a Jury upon the information and at the expense of the defendant. And the original writ of withernam shall be in form† prescribed by law.

[†See ante, p. 393.]

Any person, stipulating for damages may appear for plaintiff.

SECT. 5. *Be it further enacted*, That in any stage of the proceedings upon process pursuant to this act, any person shall be permitted to appear for the plaintiff, who will stipulate as the Court shall direct for the payment of all costs and damages that may be awarded against the plaintiff, although he can produce no special power for that purpose. [Approved January 27, 1821.]

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AN ACT regulating Bail in Civil Actions.

Officer to return bail bond with writ.

SECT. 1. **BE** *it enacted by the Senate and House of Representatives, in Legislature assembled*, That when bail is given in any civil action for the appearance of the party to answer the suit and to abide the order and judgment of the Court thereon, the officer who served the writ, shall return the bail bond (a) taken by him, with the original writ to the

(a) 1. A bail bond was holden sufficient, although the christian names of both the plaintiffs were mistaken in the bond. *Colburn & al. vs. Downes*, 10 Mass. 20.

Court or Justice before whom the same may be returnable, and if judgment be obtained against the defendant, in any such action, the Clerk of the Court or Justice of the Peace who may issue execution on said judgment, shall on the margin (b) of said execution insert the names of the persons who became bail in said action, with the places of abode, and addition of said bail: *Provided*, The same be named in the bail bond, and the officer who may receive said execution shall notify (c) the bail personally, or by leaving a written notice signed by said officer, at the usual places of abode of the bail, if living within the county in which said officer lives, at least fifteen days before the expiration thereof, certifying that he cannot find the principal debtor, nor whereof to satisfy said execution, for which notice, said officer shall have a right to demand, recover and receive of, and from said bail the usual fees for service of writs, with travel from the officer's dwelling house to that of the bail, calculated on the road most usually travelled, and shall minute in said notice the amount of said fees, which the bail shall pay in twenty days, unless the bail shall at least one day before the execution is returnable, produce and deliver (d) to the officer the principal debtor for

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Name of bail to be inserted in margin of execution.

Officer to notify bail, &c. 15 days before return day.

Officer's fees.

2. But if the bond be not executed by the principal, the bail are not liable. *Bean vs. Parker & al.* 17 Mass. 591.

3. Bail are holden, notwithstanding the execution is made returnable at an earlier day than it should have been. *Ranlet vs. Warren*, 7 Mass. 477.

4. Bail bond given at the gaol, must be returned by the gaoler to the court, or Justice before whom the writ is returnable, by ch. 522, vol. 3, p. 413.

(b) This applies to bail taken by the gaoler, after commitment on meane process, as well as to bail taken by the officer who served the writ. *Holmes vs. Chadbourne & al.* 4 Glf. 10.

(c) This provision does not excuse the sheriff from making diligent search for the body and goods of the debtor, as otherwise required. *Kidder vs. Partin*, 7 Glf. 80.

(d) 1. A surrender of the principal debtor, to the officer holding the writ of execution against him, is a discharge of the bail bond. *Byan vs. Watson*, 2 Glf. 382.

2. The administrator may surrender a principal, for whom his intestate was bail; and this, after scire facias has issued. *Wheeler vs. Wheeler*, 7 Mass. 169.

CH. 67. whom bail was given ; and it shall be lawful for the person, who may have become, or may hereafter become bail, to commit to the common gaol in the county where such arrest was made, or in that to which the writ is returnable, the principal for whom he has become bound, leaving with the gaoler or prison keeper of such county within fifteen days after such commitment, an attested copy of the writ or process, whereby the arrest was made, and of the return endorsed ; and such gaoler or prison* keeper is hereby authorized and required to receive the person so committed into custody, in the same manner as if he had been committed by the officer making the arrest ; and the person so committed shall be entitled to the liberties and privileges of the prison limits upon the same terms and conditions, and under the same restrictions as are provided where the principal is committed by order of Court. And the bail so committing their principal shall ever after be discharged from the bail bond by them given : *Provided however*, That no person shall have the benefit of the foregoing provision of this act, unless he shall have committed his principal as aforesaid, before final judgment upon *scire facias* ; and if the commitment shall have been made after the writ of *scire facias* shall have issued he shall pay the costs of that suit before he shall be discharged : *And provided, also*, That any bail, who shall claim a discharge under this section, shall have notified in writing the plaintiff

Bail may commit principal, &c.

[Mass. Stat. Feb. 20, 1818.]

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Duty of gaoler.

Proviso.

3. It is not a sufficient excuse for bail, who omitted to surrender their principal, that he is confined in the State Prison. *Parker vs. Chandler*, 8 Mass. 264. Yet when the bail arrest the principal, who is already in prison on a criminal charge, and notify the creditor of the arrest agreeably to the statute, the bail is thereby discharged although the principal be thereafter convicted of the crime charged and sentenced to confinement in the State Prison, and before judgment is rendered in the civil action. *Bigelow vs. Johnson & als.* 16 Mass. 218.

4. Nor is the enlistment of the principal into the U. S. service as a non-commissioned officer, and his being holden to duty as such, a sufficient excuse for the bail. *Sayward & al. vs. Conant & als.* 11 Mass. 146; *Harrington vs. Dennie*, 18 Mass. 93. See notes to § 3, of this chapter.

5. A submission by rule of court of the original action, and of all demands between the parties to referees, operates the discharge of the bail. *Bean vs. Parker & al.* 17 Mass. 591.

in the original suit, or his attorney of the time when and the place where the principal has been committed, within fifteen days from the time of such commitment.

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SECT. 2. *Be it further enacted*, That every person (e) who shall thus become bail, may at any time before (f) final judgment upon the original suit, bring the principal into Court and deliver him into the custody thereof, and be thereby discharged of his suretyship. And in case of the principal's avoidance and the return of *non est inventus* (g) upon the execution, the bail shall be obliged to satisfy the judgment out of his own estate, unless he shall have discharged himself in some one of the modes provided in this act. And no return of *non est inventus* made by any officer on any execution shall be considered as evidence of the debtor's avoidance so that the bail may be rendered liable on *scire facias*, unless such officer shall certify on such execution, that he has had the same in his hands at least thirty days before the expiration thereof.

Bail may bring principal into Court, and be discharged.

Bail liable if principal avoid.

No return of avoidance good unless execution is in officer's hands 30 days before return day.

SECT. 3. *Be it further enacted*, That when the principal shall avoid, so that his goods, chattels or lands cannot be found to satisfy the execution, nor his body found to be taken therewith, the person for whom judgment was given shall be

Plaintiff may have *scire facias* against the bail, and judgment,

(e) Bail may surrender the principal, by attorney. *Coolidge & al. vs. Cary*, 14 Mass. 115.

(f) It cannot be done after final judgment. *Rice & al. vs. Carnes*, 8 Mass. 490.

(g) 1. An execution delivered to the Sheriff who served the original writ, and a return of *non est inventus* by him, is sufficient to maintain a *scire facias* against the bail, although the principal live in another county. *Brown vs. Wallace*, 7 Mass. 208.

2. A return of an execution by the officer, that the judgment debtor had enlisted as a soldier in the service of the U. States, is not sufficient to charge the bail; it not being a *non est inventus*. *Herrick vs. Richardson*, 11 Mass. 234.

3. Where one is arrested and gives bail to a constable in a county other than that of his residence, a return of *non est inventus* by the sheriff of such county is sufficient foundation for a *scire facias* against the bail. *Crane vs. Shaw*, 13 Mass. 213.

4. The death of the principal at any time after the execution shall be returned, and *non est inventus* endorsed, will not discharge the bail. *Champion vs. Noyes*, 2 Mass. 481; *Rice & al. vs. Carnes*, 8 Mass. 490.

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[Mass. Stat.
June 30, 1784,
§ 2.]unless bail
bring in the
principal be-
fore judgment,
pay costs, &c.Debtor dis-
charged from
gaol unless ta-
ken in execu-
tion in 15
days.

entitled to his writ of *scire facias* (h) from the same Court* against the bail. And in case no just cause is shown, judgment shall be given against them for the damages and costs recovered against the principal, with additional damages and costs, and execution shall be awarded against them accordingly: *Provided nevertheless*, That if the bail shall bring his principal into Court before judgment is given upon the *scire facias*, and there deliver him to the order of the Court and shall pay the costs (i) which may have then arisen upon the *scire facias*, then the bail shall be discharged; and the principal shall be committed to gaol, there to remain for the space of fifteen (j) days in order to his being taken in execution. And if the creditor shall not, within fifteen days next after the surrender of the principal take him in execution, the Sheriff shall discharge him upon his paying the legal prison fees.

(h) 1. Persons and property are made liable to attachment on *scire facias*, by ch. 463, § 2, vol. 3, p. 304.

2. Upon a *scire facias* against bail, they shall not be permitted to deny the arrest of the principal. *Bean vs. Parker & al.* 17 Mass. 591. But they may show whatever will render the arrest unlawful, or ineffectual by operation of law. *Harrington vs. Dennie*, 13 Mass. 93. So they may show fraud on the part of the creditor, in procuring a *non est inventus* to be returned on the execution. *Ib.*

3. It is no bar to a *scire facias* against bail, where *non est inventus* has been returned upon the execution, that the principal was abiding in the county of the sheriff, always ready and willing to render his body in execution, and did not avoid. *Winchell vs. Stiles*, 15 Mass. 230.

4. See note c, to § 1, of this chapter.

5. Plaintiff's proceeding against the bail is not to be considered as a waiver of his action against the sheriff for the insufficiency of the bail. *Sparhawk vs. Bartlett*, 2 Mass. 188. See chs. 91 and 92, and notes thereto, in this volume.

(i) 1. The costs must be paid before the surrender, or the bail will not be discharged. *Bartlett vs. Falley*, 5 Mass. 374.

2. When bail are discharged, without surrendering the principal, no costs are given to the plaintiff on the *scire facias*. *Champion vs. Noyes*, 2 Mass. 481.

(j) If the sheriff permit a debtor, who has been surrendered by his bail under this provision, and committed to the custody of the sheriff by the Court, to go at large before the expiration of the number of days mentioned, he shall be chargeable for an escape although he was not furnished with a copy of the order of court for commitment. *Randall vs. Bridge*, 2 Mass. 549.

SECT. 4. *Be it further enacted*, That whenever bail shall hereafter be taken on mesne process in any civil action, triable before any Justice of the Peace, and there shall have been a return of *non est inventus* upon the execution which issued on a judgment rendered on such process, the said Justice may proceed, within one year from the rendition of such judgment, to issue a *scire facias* upon the same judgment against such bail, which writ being duly served seven days at least before the time therein set for trial and returned, the said Justice may proceed to take cognizance thereof; and if no just cause is shown to the contrary, to render judgment against such bail for the debt or damage, and costs recovered against the principal, with additional damages and costs and to issue execution accordingly. And it shall be no bar to such *scire facias*, that the debt and costs on the original judgment, when added together, exceed the sum of twenty dollars; but the plaintiff shall be entitled to receive his costs of suit as in other cases on such *scire facias*.

SECT. 5. *Be it further enacted*, That if the bail shall, at any time before final judgment upon the original suit is rendered against him, or upon the return of such *scire facias*, and before judgment thereon shall be rendered against him, bring his principal before such Justice, and shall procure the Sheriff of the county, or his deputy, or any Constable of the town wherein such Justice may reside, to attend and receive* him, said Justice shall thereupon order him into the custody of such officer; and the principal shall be committed to gaol, and there remain and be proceeded with as is provided in this act (*k*); and upon the payment of the costs which may have arisen on such *scire facias*, the bail shall be discharged from their suretyship as in other cases.

SECT. 6. *Be it further enacted*, That when any principal, surrendered as aforesaid, shall be ordered into custody, the said Justice shall make out, and deliver to the officer re-

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Proceedings in case of bail in actions before a Justice.

[Mass. Stat. Mar. 7, 1804 § 1.]

Bail may bring principal before Justice and procure an officer to attend:

[Ib. § 2.]

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Justice may commit him to such officer, and bail be discharged, paying costs:

In such case Justice to give mittimus to officer.
[Ib. § 3.]

(*k*) Parole evidence is not admissible to prove a surrender by bail of his principal, before a Justice of the Peace. The surrender must be of record; a mere order to the officer to take the principal into custody not being sufficient, as in cases of surrender in higher courts. *Whitton vs. Harding*, 15 Mass. 536.

CH. 67. ceiving him, a warrant or mittimus, of the tenor following,
 to wit :

STATE OF MAINE.

—, ss. To the Sheriff of the county of —, or his deputy, or to any Constable of the town of —, and to the Keeper of the gaol in said county, Greeting.

Form of mittimus.

(SEAL.) Whereas A B of C in said county [addition] at a Court this day holden before me, has been surrendered by D E of F in said county —, who was bail for the said A B in an action wherein one G H was plaintiff and the said A B was defendant, you, the said Sheriff, Deputy Sheriff, and Constable, are severally required to receive the said A B into your custody, and him forthwith to convey to the common gaol of said County; and you the said keeper are hereby required to receive the said A B in order to his being taken in execution upon the suit aforesaid. Hereof fail not; and of this warrant and your doings thereon, you are to make due return to myself, and as soon as may be. Given under my hand and seal, the — day of —, Anno Domini —. — Justice of the Peace.

Debtor, if not taken in execution in 15 days to be discharged.

And if the plaintiff shall not within fifteen days next after such surrender, in case the same shall be made upon *scire facias*, or if the same shall be made upon the original process, then within fifteen days next after final judgment, take the said principal in execution, he shall be discharged upon his paying the legal prison fees.

Penalty for officer's refusing to attend before Justice.

[Ib. § 4.]

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SECT. 7. *Be it further enacted*, That it shall be the duty of any officer as aforesaid upon the request of such person or persons being bail as aforesaid, to repair to said Justice's Court, in order to receive the principal as aforesaid; and such officer shall be allowed and paid by the bail for his receiving* and committing said principal on said warrant or mittimus, the same fees as are provided by law for committing any defendant to prison on mesne process. And all and every such officer or officers, shall have the like power and authority, and shall be under the like obligations in all respects and regards whatsoever, to execute and return such warrant or mittimus, issued by such Justice, upon the surrender as aforesaid, as he or they by law have and are under to execute and return any writ or execution whatever; and shall be subject and liable to all the like action or actions, for any fraud or falsehood and neglect of their duty, as is provided by law in other cases.

[Mass. Stat. June 30, 1784, § 8.]

SECT. 8. *Be it further enacted*, That no *scire facias* shall be served upon the bail, unless it be done within one year next after the entering up final judgment (1) against the principal.

(1) 1. By the "final judgment" is intended the first judgment, on which

SECT. 9. *Be it further enacted*, That the bail may have their remedy by action on the case against their principal for all damages sustained by their becoming his sureties. [Approved March 19, 1821.]

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[Ib. § 4.]

Additional Act, ch. 522, Vol. 3, p. 413.

Chapter 68.

AN ACT respecting Bailable Offences.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That any one or more of the Justices of the Circuit Court of Common Pleas, or any two Justices of the Peace and of the quorum for any county, on application made to them by any person who now is, or hereafter may be, confined in gaol for a bailable offence, or for not finding sureties, on recognisance, may proceed to inquire into the same, and admit any such person to bail; and for this purpose shall have and exercise the same power concurrently, which any one or more of the Justices of the Supreme Judicial Court, may or can do; any law, usage or custom to the contrary notwithstanding. And the power hereby given shall be considered to extend to taking the recognisance of any person, committed after conviction, where the sentence is in part, or in whole, to find sureties for good behaviour. [Approved March 10, 1821.]

Who may admit persons to bail.

Who may be bailed.

[Mass. Stat. June 22, 1812.]

Extent of the power to bail.

the plaintiff may sue out an execution; whether such judgment be rendered in the Common Pleas or Supreme Court; and a judgment on review is not intended. *Sweett & al. vs. Sullivan*, 7 Mass. 342.

2. The action of debt on a bail bond is not taken away by § 8, it seems, but it must be brought within one year next after the entering up of final judgment against the principal. *M'Rae vs. Mattoon*, 10 Pick. 49.

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Chapter 69.*

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AN ACT directing and regulating the Process of Outlawry.

Persons liable
to the process
of outlawry.

[Mass. Stat.
Oct. 2, 1782,
§ 1.]

Form of writ
and nature of
proceedings a-
gainst him.

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SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That when any person that now is charged, or hereafter shall stand charged of any criminal offence before the Supreme Judicial Court of this State, by the indictment or presentment of a Grand Jury, whether the same indictment or presentment be originally found in that Court, or removed thither from any inferior jurisdiction, by appeal, or writ of certiorari, shall abscond to avoid answering, or abiding and performing the judgment that may be given thereon, whether such absconding be before or after the Jury shall indict or present the offender, a writ shall issue to the Sheriff of the county where such offender was an inhabitant or resident, at the time of finding the same bill, directing him to make known unto such offender, that unless he shall appear on the first day of the next sitting of the said Supreme Judicial Court, and there traverse the same charge, and abide the judgment that may be given thereon, or appear and give such security therefor by way of recognisance as the said Court shall order, such person will then and there be declared an outlaw, and be subjected to all the penalties and disabilities in this act declared to be incident to a person under sentence of outlawry, and the mode of executing the said writ of scire facias shall be, by leaving an authenticated copy thereof certified by the Sheriff at the offender's dwelling house or last place of abode, sixty days at the least before the same process shall be returnable, and shall cause an abstract or notification of the subject matter in the same writ mentioned, sixty days before the return day at the least, to be printed in one of the most public weekly newspapers, and to be continued five several weeks inclusive ; and shall cause him to be publicly called in every Circuit Court of Common Pleas in his county, that shall be holden while the same process shall be in his custody ; which writ of scire facias being served and returned in manner aforesaid, and filed in Court, shall be entered on the docket, and the party against whom the same is sued, after having been publicly called in the said* Su-

preme Judicial Court, to appear and answer the charge alleged against him as aforesaid ; if he shall not appear upon such notice and proclamation, his default shall be recorded, and such offender may by the same Court be declared an outlaw, without any other act or ceremony ; any former law usage or custom to the contrary notwithstanding : *Provided always*, It shall be in the power of the said Court, when the offence charged shall be by law bailable, to continue the same scire facias, or suspend passing judgment of outlawry thereon, until the next or some succeeding term, in case sufficient bail shall be given for the offender's answering and abiding the judgment of the said Court thereon. And that it may regularly and certainly be determined when a person may be said to have absconded to escape punishment :

SECT. 2. *Be it further enacted*, That any person after having appeared and pleaded to an indictment or presentment, who shall have departed without leave of the Court, or shall have broken gaol after commitment upon, and before conviction on the charge alleged in the bill, or shall fail or neglect to appear and answer according to the tenor of a recognisance regularly taken for that purpose, or when the Sheriff of the same county whereof the offender was an inhabitant, or resident at the time of his committing the offence for which he shall stand indicted, or his deputy, shall make return upon a capias issued in consequence of the bill, wherein the term of four months at the least shall have elapsed, between the issuing the capias and the return day thereof, that after making diligent search and inquiry after such offender, he could not find him in his precinct, shall be deemed and taken as sufficient evidence of the absconding of such person within the intent of this act.

SECT. 3. *Be it further enacted*, That a capias and an alias capias issued from the Circuit Court of Common Pleas, on a bill of indictment or presentment there found, wherein fifty days at the least shall have elapsed between the issuing and return of the same writs respectively, and returned by the proper officer, that after diligent search and inquiry after such offender he could not find him in his precinct, before the removal of the record into the Supreme Judicial Court,

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When a person has appeared and pleaded to indictment, &c. and departed without leave — proceedings against him.

[Ib. § 2.]

If non est inventus be returned on the capias and alias capias issued from C. C. Pleas—no like process need issue from S. J. Court.

[Ib. § 3.]

CH. 69. shall render the issuing a like process in the Supreme* Judicial Court before scire facias ut legatum unnecessary.

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How capias from S.J. Court is to be made returnable.

[Ib. § 4.]

SECT. 4. *Be it further enacted*, That where a capias shall issue from the Supreme Judicial Court, to apprehend an offender on a bill of indictment or presentment in any county where the said Court shall be held but once a year, the same capias may be made returnable to some session of the said Court in some other county, at the expiration of five or six months, if the said Court shall so order, to the end scire facias ut legatum may timely issue returnable to the next term, if the offender should not be taken on the capias.

Persons against whom a judgment of outlawry is in force—how far disqualified.

[Ib. § 5.]

SECT. 5. *Be it further enacted*, That all persons against whom judgment of outlawry shall be given, shall during the time the same judgment shall continue in force, be, and hereby are disabled from bringing or maintaining, in their own right any civil action or suit, in any Court of Law or Equity within this State, excepting a writ of error for reversing his outlawry ; and shall be under such other disabilities and disqualifications in civil society as a person convicted and sentenced for the offence charged in the bill upon which he may be outlawed : and in all cases where a greater forfeiture does not by law accrue to the State upon a conviction and judgment on such bill of indictment shall forfeit the issues and profits of all his real estate during the life of the outlaw, in case the judgment of outlawry shall so long remain in force ; and be further liable to be apprehended, upon capias ut legatum, and sentenced in the same manner as if he was convicted by a Jury of the charge alleged in the bill.

Real estate of a person outlawed, bound to respond judgment, &c.

[Ib. § 6.]

SECT. 6. *Be it further enacted*, That the real estate of every person outlawed, shall be held liable, and be bound, from the time of issuing the scire facias ut legatum to respond the judgment that shall be given on the indictment or presentment, so far as relates to the fine and cost.

Estate of persons recognising to State, also bound, though alienated.

[Ib. § 7.]

SECT. 7. *Be it further enacted*, That the lands and tenements of all persons recognising to the use of this State, before any authority duly authorized and empowered to take the same, are and shall be liable to respond the sum mentioned in the same recognizance, from the time the same is taken

and acknowledged, notwithstanding any transfer or alienation thereof. CH. 70.

SECT. 3*. *Be it further enacted*, That every offender that may be outlawed, upon his appearing in open Court, and confessing the charge, and receiving sentence thereon, or appearing and traversing the charge, shall be acquitted by a Jury or on demurrer, or any other plea, the same shall be adjudged insufficient in law to compel the person accused to answer thereunto, or support a judgment thereon : in every such case, the proceeding shall be construed to operate as a full and effectual reversal of the judgment of outlawry as though a former reversal had been given upon a writ of error expressly brought for that purpose : *Provided*, The appearance upon which such acquittal shall be given shall be voluntary and without compulsion, and within one year and a day after judgment of outlawry shall be pronounced, and the cost accruing on the process of outlawry shall be first satisfied and paid. [Approved February 24, 1821.]

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Proceedings when a person outlawed appears in Court and confesses or traverses, &c.
[Ib. § 8.]

Chapter 70.

AN ACT for regulating Marriage, and for the orderly solemnization thereof.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That no man or woman shall intermarry within the degrees hereafter named, that is to say :

Degrees, within which marriages are void, as incestuous.

No Man shall marry his
Mother,
Grandmother,
Daughter,
Son's Daughter,
Daughter's Daughter,
Step Mother,
Grandfather's Wife,
Son's Wife,
Son's Son's Wife,
Daughter's Son's Wife,
Wife's Mother,
Wife's Grandmother,
Wife's Daughter,

No Woman shall marry her
Father,
Grandfather,
Son,
Son's Son,
Daughter's Son,
Step Father,
Grandmother's Husband,
Daughter's Husband,
Son's Daughter's Husband,
Daughter's Daughter's Husband,
Husband's Father,
Husband's Grandfather,
Husband's Son,

[Mass. Stat.
Mar. 16, 1786.]

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Wife's Son's Daughter,
Wife's Daughter's Daughter,
Sister,
Brother's Daughter,
Sister's Daughter,
Father's Sister,
Mother's Sister.

Husband's Son's Son,
Husband's Daughter's Son,
Brother,
Brother's Son,
Sister's Son,
Father's Brother,
Mother's Brother.

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And* if any man or woman shall intermarry within the degrees aforesaid, every such marriage shall be deemed, taken and adjudged incestuous, and shall be null and void.

Certain other
marriages to be
void.

SECT. 2. *Be it further enacted*, That all marriages, where either of the parties shall have a former wife (a) or husband living at the time of such marriage, and all marriages between any white person and any Negro, Indian or Mulatto (b) shall be absolutely void.

Persons au-
thorized to sol-
emnize mar-
riages.

[Mass. Stat.
June 22, 1786,
§ 1.]

SECT. 3. *Be it further enacted*, That every Justice of the Peace, and also every ordained Minister of the Gospel, who shall be duly appointed and commissioned for that purpose by the Governor, with the advice of Council, be, and they respectively are authorized and empowered to solemnize (c). marriages within the county, where they reside, be-

(a) After a divorce from the bands of matrimony in this State, for adultery, a marriage contracted here by the guilty party, living the innocent party, is unlawful and void. *West Cambridge vs. Lexington*, 1 Pick, 507. *Putnam vs. Putnam & al.* 8 Pick. 433. But if such party, being a resident in this State, for the sake of evading the law, goes into another State where such a marriage is valid, and is there married and immediately returns and continues to reside here, the marriage is valid here. *Ib.*

(b) 1. A mulatto is a person begotten between a white and a black. *Medway vs. Natick*, 7 Mass. 88.

2. The issue of such a person and a white is not a mulatto. *Ib.*

3. A marriage between a white person and a mulatto, or negro, which has taken place in another State, where the laws allow it, is not void or unlawful if the parties remove into this State. *Medway vs. Needham*, 16 Mass. 159.

4. *Com. vs. Spooner*, 1 Pick. 235.

(c) 1. It is a substantial compliance with the statute regulating marriages for the parties themselves to make the mutual agreements in the presence of a justice of the peace, or a minister, with his assent, he undertaking to act on the occasion in his official capacity. *Milford vs. Worcester*, 7 Mass. 48.

2. But if the justice, or minister, does not consent to act in his official character, the marriage is void. *Ib.*

3. No form of words is established for the solemnization of a marriage. *Ib.*

tween persons who may lawfully enter into that relation, when one or both of the parties are resident within the county in which such Justice or Minister resides.

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SECT. 4. *Be it further enacted*, That the Governor with the advice of Council be, and he is authorized to appoint and commission such ordained Ministers of the Gospel, as the public good may require, to solemnize marriages within the county in which they may reside (*d*), who shall hold the said office during his pleasure: and said commission shall be conclusive evidence, that the person therein named is an ordained Minister of the Gospel; and whenever said commission shall be revoked, an attested copy of such revocation shall be filed in the office of the Clerk of said county.

Governor to appoint and commission or-
dained minis-
ters to marry.

SECT. 5. *Be it further enacted*, That all persons desiring to be joined in marriage, shall have such their intentions published (*e*) at three public religious meetings, on different days, at three days distance exclusively, at least, from each other, in the town or plantation wherein they respectively dwell; or shall have their intentions of marriage posted up by the Clerk of such town or plantation, fourteen days in some public place, within the same town or plantation, fairly written; and shall also produce to the Justice or Minister, who shall be desired to marry them, a certificate of such publishment, under the hand of the Clerk of such town or plantation respectively; and where a male under twenty-one years, or a female under eighteen years of age, is to be married, the consent* of the parent, guardian or other person, whose immediate care and government such party is under, if within the State, shall be first had to such marriage. And in case the parties or either of them, live in a town or place, where there shall be no Clerk, then publishment shall be made in the town next adjoining, in manner aforesaid, and a certificate from

Intentions of marriage to be published, &c.

[Mass. Stat. June 22, 1786, § 3.]

Certificate to be delivered to Minister or Justice.

Consent of parent or guardian necessary in certain cases.

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Publishment in adjoining town in case.

(*d*) And in other counties, in certain cases. See ch. 391, vol. 3, p. 238.

(*e*) A marriage solemnized by a minister or justice, between parties who may lawfully marry, although without publication of banns, and without the consent of parents and guardians, is valid, although the officer incurs a penalty for a breach of his duty. *Milford vs. Worcester*, 7 Mass. 48; *Medway vs. Needham*, 16 Mass. 160.

CH. 70. the Clerk of the same town, of such publishment, shall be produced as aforesaid, previous to their marriage.

If banns are forbidden what proceedings must be had.

[Ib. § 4.]

SECT. 6. *Be it further enacted*, That if at any time the banns of matrimony betwixt any persons shall be forbidden, and the reasons thereof assigned, in writing, by the person so forbidding the same, left with the town or plantation Clerk, he shall forbear issuing a certificate as aforesaid, until the matter shall have been duly inquired into, and determined before two Justices of the same county, quorum unus (f): *Provided*, The person forbidding the banns, shall, within seven days after filing the reasons as aforesaid, apply unto two Justices as aforesaid, and procure their determination thereon: unless the said Justices shall certify unto the said Clerk, that a further time is necessary for their determination on the reasons filed; in which case the Clerk shall forbear issuing a certificate, until the time then certified to be necessary shall expire, unless the Justices shall sooner determine; according to whose determination, the Clerk shall govern himself herein; and if the said Justices shall determine, that the reasons assigned by the person forbidding the said banns, were not supported by the laws of the State, then the person so forbidding shall pay all the costs that may have arisen in consequence of such objection; and the said Justices shall make up judgment and issue execution accordingly.

Penalty for pulling down publishment.

[Ib. § 5.]

For marrying persons contrary to law.

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SECT. 7. *Be it further enacted*, That if any person shall deface or pull down any publishment posted up in writing as aforesaid, before the expiration of the said fourteen days, he shall forfeit and pay the sum of four dollars, to the use of the town. And if any Justice of the Peace or Minister, shall, otherwise than is expressly allowed and authorized by this act, join any persons in marriage, they shall severally forfeit and pay the sum of one hundred dollars, two third parts thereof* to and for the use of the county wherein the offence may be committed, and the residue to the prosecutor, to be sued for and recovered in the Circuit Court of Common Pleas, within the same county, by the Treasurer thereof, who

(f) It is only necessary that one of the Justices should be of the quorum. *Gilbert vs. Sweetair*, 4 Glf. 488.

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is hereby enjoined upon due information thereof, to prosecute and sue for the said penalty without delay, or by the parent, guardian, or other person under whose immediate care and government either of the parties were at the time of such marriage; and every Justice or Minister, against whom such recovery shall be had, is hereby forbidden from joining persons in marriage forever after. And in case a person forbid as aforesaid, or any other person whatever, not authorized and empowered to solemnize marriages by this act, shall join any persons in marriage, and be convicted thereof, in the Supreme Judicial Court, upon presentment or indictment, he shall suffer solitary imprisonment for a term not exceeding twenty days, and be confined to hard labor for a term not exceeding five years.

Punishment of those who solemnize marriages not being authorized.

SECT. 8. *Be it further enacted*, That every Justice and Minister shall make and keep a particular record (g) of all marriages solemnized before them respectively; and in the month of April yearly and every year, shall make a return to the Clerk of the town† or plantation in which he lives, certifying the names of all the persons, who have been by them respectively joined together in marriage within the year then last past, if any such have been by them so joined together. And if any Justice or Minister shall neglect to make such return, within the month of April annually, he shall forfeit the sum of fifty dollars, to be recovered by action of debt in the Circuit Court of Common Pleas, one half thereof to the use of the county, and the other half to the use of the person who may sue for the same.

Justices and ministers to keep record of marriages and make return to town clerk.

[Ib. § 6.]

[† See ch. 391, § 2, vol. 3, p. 239.]

Penalty for neglect.


SECT. 9. *Be it further enacted*, That any marriages which shall be had and solemnized, among the people called Quakers or Friends, in the manner and form used and practised in their societies, shall be good and valid in law, any thing in this act to the contrary notwithstanding; and the Clerk or keeper of the records of the meeting wherein such marriage shall be had and solemnized, shall once a year make

Marriages among Quakers, according to their forms, valid.

[Ib. § 8.]

Clerk of their meetings to make return of

(g) A record of a marriage solemnized by a minister or justice, founded on a certificate duly made, is legal evidence of the marriage; and no inquiry is made as to the publication of the banns, the consent of parents or guardians, or the inhabitation of the parties. *Milford vs. Worcester*, 7 Mass. 48.

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 marriages to
 clerk of town.

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Penalty for
 neglect.

No minister,
 not commis-
 sioned, to mar-
 ry after May 1,
 1821.

a certificate under his hand of all marriages had and solemnized* in the society or meeting to which he belongs, and shall deliver the same to the Clerk of the town, in which the Clerk of said meeting resides ; and if he shall neglect so to do, he shall forfeit the sum of fifty dollars, the one half to the use of the county, the other half to the use of the prosecutor, to be recovered by an action of debt.

SECT. 10. *Be it further enacted*, That no Minister of the Gospel, not appointed and commissioned as aforesaid, shall solemnize any marriage after the first day of May next. [Approved February 19, 1821.]

Additional Act, ch. 391, Vol. 3, p. 238.

Chapter 71.

AN ACT regulating (a) Divorces.

Sup. J. Court
 to decide all
 questions of
 Divorce and
 Alimony.
 [Mass. Stat.
 Mar. 16, 1796,
 § 1.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That all questions of divorce and alimony shall be heard and tried by the Supreme Judicial Court holden for the county (b) where the

(a) Regulations on the subject of marriage and divorce, are rather parts of the criminal, than of the civil code. *Barber vs. Root*, 10 Mass. 265.

(b) 1. The libel must be originally filed in the county where the parties live. *Moore vs. Moore*, 2 Mass. 117.

2. A libel filed in a county into which the libellant has removed, leaving the respondent in another county, will not be sustained. *Richardson vs. Richardson*, 2 Mass. 153. Nor when the parties have removed into this State since the offence charged. *Hopkins vs. Hopkins*, 3 Mass. 158.

3. If the parties have no permanent residence, the libel may be filed in the county where the libellant dwells after separation. *Lane vs. Lane*, 2 Mass. 167.

4. A libel will be sustained where the evidence is that the adultery was committed in another State, the respondent having no settled place of residence, and the libellant dwelling in the county where the libel is filed, at the time the adultery was committed. *Squire vs. Squire*, 3 Mass. 184. In such case if the criminal party still resides out of the State, the libel will be dismissed. *Carter vs. Carter*, 6 Mass. 263. See below, note c.

5. When the cause of the libel is adultery, if the names of the persons

parties live, and that the decree of the same Court shall be final.

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SECT. 2. *Be it further enacted*, That no cause of divorce or alimony shall be brought before the same Court, unless the party suing or complaining shall file his or her libel in the office of the Clerk (c) of the said Court, therein setting forth the cause of his or her complaint specially, and shall cause the other party, if in this State, to be served (d) with an attested copy of the same, and with a summons to appear at the Court, fourteen days at least before the sitting of said Court (e) where the cause is to be tried; otherwise, in such manner as the said Court shall direct; and the said Court shall have all the powers necessary to the conducting and

Libel to be filed in Clerk's office, and opposite party to be served with copy, if in the State—

[Ib. § 8.]

If not, such notice must be given as the Court may order.

with whom the adultery was committed are unknown, it should be so averred. *Choate vs. Choate*, 3 Mass. 391.

(c) 1. If the respondent lives out of the State, the libel need not be filed in the Clerk's office, but the fact should be set forth in the libel. *Choate vs. Choate*, 3 Mass. 391.

2. The libel must be subscribed by the party, and not by an attorney. *Willard vs. Willard*, 4 Mass. 506. Nor can it be sued by the guardian of a spendthrift. *Winslow vs. Winslow*, 7 Mass. 96.

3. Upon the suggestion of counsel that the respondent was insane, the court admitted him to plead in her name. *Broadstreet vs. Broadstreet*, 7 Mass. 474. When it appeared that since the fact charged, the respondent had become insane, the court would proceed no farther without the appointment of a guardian, who might appear for him in the action. *Mansfield vs. Mansfield*, 13 Mass. 412.

(d) 1. A service by reading is not sufficient. *Smith vs. Smith*, 9 Mass. 422.

2. A constable is not authorised to serve a summons issued upon a libel. *Brown vs. Brown*, 15 Mass. 889.

3. A libel may be amended and served anew on the respondent. *Anderson vs. Anderson*, 4 Glf. 100; *Tourtletot vs. Tourtletot*, 4 Mass. 506.

(e) 1. The words, before the sitting of said Court, are equivalent to the words "before the first day of the term." *Anon.* 5 Mass. 197. See *Smith vs. Smith*, 6 Mass. 36. Where a copy of the libel and summons had been left by an officer at the last and usual place of abode of the party libelled, but it appeared that she was not there, nor afterwards before the sitting of the Court within the county, the Court would not hear the cause until personal notice be given. *Randall vs. Randall*, 7 Mass. 502.

2. The service must be by copy—reading the libel and summons is not sufficient. *Smith vs. Smith*, 9 Mass. 422.

CH. 71. finally issuing such causes, according to the true intendment of this act.

Divorces from bond of matrimony, in what cases decreed.

[Ib. § 3.]

[†See ante p. 79 ch. 10, § 2.]

In what cases from bed and board.

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SECT. 3. *Be it further enacted*, That divorces from the bonds of matrimony shall be decreed, in case the parties are within the degrees by law prohibited, or either of them had a former (*f*) wife or husband alive at the time of solemnizing such second† marriage, or for impotency or adultery (*g*) in either of the parties, and for no other cause; and that divorce from bed and board (*h*) may and shall be granted for the cause* of extreme cruelty (*i*) in either of the parties, or when-

(*f*) Ante, p. 420, note *a*, to § 2.

(*g*) 1. Divorce from the bonds of matrimony will not be decreed unless a legal marriage be proved. *Mangue vs. Mangue*, 1 Mass. 240.

2. The record of the conviction of the respondent upon an indictment for adultery, is sufficient evidence both of the marriage and of the offence. *Anderson vs. Anderson*, 4 Glf. 100; *Randall vs. Randall*, ib. 326.

3. Where adultery is the cause of the libel, and a second marriage of the respondent is to be proved, the court will not receive the usual certificate of the officiating minister at the second marriage as evidence, but will require his testimony upon oath. *Ellis vs. Ellis*, 11 Mass. 92.

4. In a libel for divorce from the bands of matrimony for adultery, proof that the injured party has forgiven the offence by subsequent cohabitation with the offender, will bar the libel. *North vs. North*, 5 Mass. 320; *Perkins vs. Perkins*, 6 Mass. 69; *Anonymous*, ib. 147. But this rule will not apply to a libel for a divorce from bed and board. *Perkins vs. Perkins*, 6 Mass. 69.

5. Such proof may be given in evidence under a general traverse of the facts alleged in the libel. *Backus vs. Backus*, 3 Glf. 136.

6. If the respondent in a libel for divorce for adultery would show a like crime in the libellant, to prevent the divorce, he must plead it or he will not be permitted to give it in evidence. *Pastoret vs. Pastoret*, 6 Mass. 276.

7. Confessions of the respondent as to the fact of adultery, are not admissible unless corroborated. *Baxter vs. Baxter*, 1 Mass. 346; *Holland vs. Holland*, 2 Mass. 154.

(*h*) 1. In a libel for divorce *a mensa et thoro*, the Court will require evidence of the marriage, even though the respondent does not appear, to answer the libel. *Williams lib. vs. Williams*, 3 Glf. 125; overruling the decision in *Hill vs. Hill*, 2 Mass. 150.

2. A wife divorced *a mensa et thoro* may sue or be sued as a feme sole for property acquired, or debts contracted by her subsequently to the divorce. *Dean vs. Richmond*, 5 Pick. 461.

(*i*) 1. Extreme cruelty here, means personal violence, and answers to the *Savitia* of the civil law. *Warren vs. Warren*, 3 Mass. 321.

ever any husband shall utterly† desert (j) his wife, or shall grossly or wantonly and cruelly neglect or refuse to provide suitable maintenance for her, being of sufficient ability thereto.

SECT. 4. *Be it further enacted*, That when it shall appear that the adultery or cruelty complained of, is occasioned by the collusion of the parties, and done with an intention to procure a divorce, or that both parties have been guilty of adultery, in such case, no divorce shall be decreed.

SECT. 5. *Be it further enacted*, That when a divorce shall be had for the causes of affinity, consanguinity, or of impotency of either of the parties, the wife shall have restored to her all her lands, tenements and hereditaments; and a judgment may be passed for a restoration to her of all, or such part of the personal estate specifically, or the value thereof, which hath come to her husband's hands by force of the marriage, as the Justices of the Supreme Judicial Court, from all the circumstances of the case, shall determine equitable; and they may make use of such kind of process to carry their judgment into effect, as shall be necessary; and the Court, in case they think proper, may compel the husband to disclose, on oath, what personal estate he hath received in right of his wife, and how the same hath been disposed of, and what proportion thereof remained in his hands at the time of such divorce: and when the divorce shall be for the cause of adultery committed by the husband (k), in addition to her dower, to be assigned her in the lands of her husband, in the same manner as if such husband was naturally dead (l) and to

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[†Altered by additional act; also, ch. 456, vol. 3, p. 298.] In cases of collusion, or adultery of both parties, no divorce to be decreed. [Ib. § 4.]

In cases of divorce for affinity, &c. wife shall have all her lands restored to her, and such part of her personal estate, as they think proper.

[Ib. § 5, and Mar. 7, 1806.]

And may compel husband to disclose on oath an account of property.

When divorce is decreed, for adultery of husband, wife to have dower, the real estate

2. A charge of *extreme cruelty*, and of *adultery* may be joined in the same libel, and the Court will decree according to the evidence produced. *Young vs. Young*, 4 Mass. 430.

(j) A libel alleging that the respondent, within five years last past, has deserted the libellant, and committed the crime of adultery, is insufficient. *Church vs. Church*, 3 Mass. 157.

(k) This statute applies to divorces decreed after the passing it, whether the adultery was committed before or after the date of the statute. *West vs. West*, 2 Mass. 228.

(l) 1. The Court will not assign dower upon a libel, but the claimant must pursue the same remedy as if the husband were dead. *Smith vs. Smith*, 13 Mass. 231.

- CH. 71.** the real estate which her husband held in her right, the Court by whom such divorce may be decreed, shall have power to assign to the wife for her own use, all the personal estate which the husband hath received by reason of the marriage, or such part thereof as shall be just and reasonable, under all the circumstances of the case, or a sum of money equal in value to the whole of the said personal estate ; or to so much thereof as the Court may judge proper should be so assigned to her. But if the personal estate or money which the Court are by this act authorized to assign to the woman so divorced, together with her dower in her* husband's real estate, should be insufficient for her reasonable and comfortable support, then the Court may allow her reasonable alimony out of her husband's estate, so long as she shall remain unmarried, in the same manner as alimony may be allowed to a woman divorced from bed and board, for the cause of extreme cruelty in the husband : regard to be had, in making such allowance, to the character, circumstances and property of the husband, and the character and situation of the wife. And where the divorce shall be occasioned by adultery committed by the wife, the husband shall hold her personal estate forever, and her real estate during his natural life, in case they have had issue born alive of her body during the marriage ; otherwise during her natural life only, if he shall survive her : *Provided nevertheless*, That the Court may allow her for her subsistence so much of such personal or real estate as they shall judge necessary. And whenever a decree of divorce from bed and board shall be made because of the cruelty of the husband or of his utterly deserting his wife, or grossly or wantonly and cruelly neglecting or refusing to provide suitable maintenance for her, being of sufficient ability thereto, the wife, if there be no issue living at the time of the divorce, shall be restored to all her lands (*m*), tenements and hereditaments, and shall be allowed out of his personal estate such
- held in her right and all or part of the personal estate received of her by her husband, as Court may order.
- [See additional act.]
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- And if these be insufficient, Court may allow her alimony out of her husband's estate.
- In cases of divorce for adultery of wife, what the husband shall hold.
- Proviso.
- In case of divorce for cruelty or desertion of husband, what proceedings shall be had as to property.

2. This provision embraces all the lands of which the husband has been seized at any time during the coverture. *Davol vs. Howland*, 14 *Mass.* 219.

(*m*) Including land which has been alienated by the husband during the coverture, without her consent. *Kriger vs. Day*, 2 *Pick.* 316.

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alimony (n) as the Court shall think reasonable, having regard to the personal property that came to the husband by the marriage, and to his ability ; but if there be issue living at the time of the divorce, then the Court, with respect to ordering restoration, or granting alimony as aforesaid, may do as they shall judge the circumstances of the case may require ; and upon application from either party, may from time to time, make such alterations therein as may be necessary. And whenever the wife shall file in the Clerk's office a libel against her husband praying for a divorce from bed and board for any of the causes mentioned in this act, and shall cause the same to be served on him, all his lands within the State shall be considered as attached and bound to answer the order or judgment of the Court, in case a divorce is decreed upon said libel ; and in such cases the Court may order and adjudge, that the whole or any part of the* real estate of the husband, or of the rents and profits of the same, shall be assigned and set off to the wife, for and during her life, and may make use of such process to enforce such judgment, as may be deemed necessary and proper. And in case a divorce shall be decreed for cruelty in the wife, whether there shall be issue or not of the marriage, at the time of the divorce, the Court may order to her a restoration of the whole, or such part of her lands, tenements and hereditaments, and may also assign alimony as they may judge proper.

SECT. 6. *Be it further enacted*, If any persons who shall be divorced for the cause either of affinity or consanguinity shall, after such divorce, cohabit together, such persons so offending shall be liable to all the pains and penalties provided by the laws then in being against incest ; and if any persons shall cohabit or live together in the same house after

On application of either party Court may make alterations as to alimony, restorations, &c.

In case of libel by wife for divorce from bed and board and service on husband, his lands, &c. held to answer, &c. in case divorce be decreed.

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In case divorce be decreed what proceedings shall be had as to property.

In case of divorce for the cruelty of the wife what proceedings shall be had as to property.

Punishment for cohabiting or living in the same house after divorce from bond of matrimony.
[Mass. Stat. Mar. 6, 1786, § 6.]

(n) 1. An action of debt lies for alimony decreed by the S. Court on a sentence of divorce. *Howard vs. Howard*, 15 Mass. 196.

2. This Court has no authority to decree a restoration to the wife of the personal property which belonged to her at the time of the marriage. *Dean vs. Richmond*, 5 Pick. 461.

3. Such a divorce does not affect the right of the husband to reduce into possession choses in an action which belonged to the wife prior to the divorce. *Ib.*

CH. 72. a divorce, for the cause of prior marriage or adultery, such persons shall be liable to all the pains and penalties provided by the laws then in being against adultery. *Provided always,* That no decree of divorce for or on account of adultery, shall bar the issue of such marriage from inheriting; but the question of the right of such child or children to inherit shall be tried and settled upon the principles of common law, in the same manner as though this act had never been made. [Approved February 10, 1821.]

Decree of divorce for adultery not to bar children of their inheritance.

Additional Act, ch. 440, Vol. 3, p. 283.

Chapter 72.

AN ACT for the maintenance of Bastard Children.

When a woman shall accuse a man as father of a bas-

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled (a), That whenever any woman who hath been delivered of a bastard child,

(a) 1. In prosecutions under this statute the complainant must file in the C. C. Pleas a declaration stating that she *has* been delivered of a bastard child—which was begotten of her body by the person accused—the time and place when and where it was begotten, with as much precision as the case will admit—that being put upon the discovery of the truth during the time of her travail, she accused the respondent of being the father of the child, and that she has continued constant in such accusation. To such declaration the plea to the merits is, *not guilty*. *Foster vs. Beaty*, 1 *Glfc.* 304.

2. Prosecutions under this statute are not local. *Dennett vs. Kneeland*, 6 *Glfc.* 460.

3. It is essential in such prosecutions that the mother accuse the putative father during her travail, and before delivery; but this fact need not be alleged in her complaint, which may be made before the event has happened. *Ib.* *Bacon vs. Harrington*, 5 *Pick.* 63.

4. Accusing *about* the time of her travail is not sufficient. *Cem. vs. Cole*, 5 *Mass.* 517. But it is sufficient if she continues constant in her accusation from the time of her examination before the Justice. Her previous declarations, inconsistent therewith, are objections to her credibility, not to her competency. *Maxwell vs. Hardy*, 8 *Pick.* 560.

5. But it must be proved by other testimony than that of the mother, and before she is to be received as a witness. *Drowne vs. Stimpson*, 2 *Mass.* 441.

or being pregnant with a child which if born alive, may be a bastard, shall accuse any man of being the father thereof before any Justice of the Peace and desire a prosecution against the man whom she accuses of being the father of the child, the Justice shall then proceed to take her accusation and examination, in writing, under oath, respecting the man so accused,* and the time and place where she was begotten with child, with such other circumstances as he shall judge necessary for the discovery of the truth of such accusation, and at his discretion may bind (b) him that is so accused to the next Circuit Court of Common Pleas, with sufficient surety or sureties, to answer to such accusation, and abide the order of Court thereon. And if the woman be not then delivered, or be unable personally to attend the said Court, may order the continuance or renewal of his and her bond, that they may be forth coming at the next Circuit Court of Common Pleas after the birth of the child, and the continuance of such bonds aforesaid to the next Circuit Court of Common Pleas entered thereon by order of the said Court, (unless the surety or sureties shall object thereto) shall have the same force and effect as a recognisance taken in Court for the next term. And if she being put upon the discovery of the truth respecting the same accusation in the time of her travail, shall thereupon accuse the same person of being the father of the child, of which she is about to be delivered, and shall continue constant in such accusation, and shall prosecute him as the father of such child before the Circuit Court of Common Pleas in the manner herein prescribed, (in which

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tard child, before a Justice of the Peace, what proceedings shall be had.

(Mass. Stat. Mar. 15, 1786, § 2.)

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Accused to be held to give bond to appear and answer at next C. C. Pleas.

If woman be unable to attend Court, or not delivered, cause may be continued and bond renewed or continued.

What proof necessary, and what admissible on trial.

(b) 1. A bond is not necessary to give jurisdiction to the C. C. Pleas, if the defendant appear, either in person or by attorney. *Mariner vs. Dyer, in certiorari*. 2 Glf. 165.

2. A bond given in a prosecution under this statute, conditioned that the accused shall appear and *abide the order of Court*, obliges him to the payment of such money as the Court shall order for the maintenance of the child, as well as to the giving of a new bond for the performance of such order. *Taylor & ux. vs. Hughes & al.* 3 Glf. 433.

3. A Justice of the peace can bind the putative father to answer only by taking a bond, and not by recognizance. *Johnson vs. Randall*, 7 Mass. 340; *Merrill vs. Prince*, 7 Mass. 396.

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Adjudication
by the Court,
on verdict or
default, and
order thereon.

Form of the is-
sue to be tried.

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prosecution she shall be admitted as a competent witness (c), and her credibility be left to the Jury) and such examination shall be given in evidence on the trial of the issue or if by default or by his plea he shall admit the truth of the allegations contained in said prosecution, he shall be adjudged (d) the reputed father of such child, and stand charged with the maintenance thereof, with the assistance of the mother, as the Justices of the same Court shall order (e); and shall give security to perform the said order, and to save the town or place which might be otherwise chargeable with the maintenance of such child, free from charge for its maintenance, and may be committed to prison until he find sureties for the same, unless the pleas and proofs made and produced on the behalf of the man so accused, and other circumstances, be such as the Jury, by whom the issue, whether he is guilty or not guilty, shall be tried, shall find him not guilty; in which case the Justices of the said Court shall acquit him thereof: and the verdict of the* Jury of the same Court whether guilty or not guilty, shall be final (f) respecting such issue:

(c) Evidence that the complainant's general character for chastity, previous to her connexion with the respondent, was bad, is inadmissible to impeach her credibility. *Com. vs. Moore*, 8 Pick. 194.

(d) A man must be adjudged to be the putative father of a bastard child before the Court can pass an order against him for maintenance of such child. *Com. vs. Clark*, 2 Mass. 156.

(e) 1. An order on the putative father to pay a sum weekly, till the further order of Court, is warranted by the statute. *Mariner vs. Dyer*, in *certiorari*, 2 Glf. 165.

2. So also is a judgment for costs. *Ib.*

3. The Court has no legal authority to order the father to pay money for lying in charges, *eo nomine*. *Com. vs. Cole*, 5 Mass. 517.

4. By ch. 487, vol. 3, p. 335, a person imprisoned on a bastardy process, and unable to comply with the order of Court, may take the poor debtor's oath after three months' imprisonment.

(f) 1. By law no appeal has ever been allowed, I believe, in Massachusetts, or this State, to the S. J. Court, from a judgment in a prosecution upon the statute for the maintenance of bastard children. The judgment of the Court below always has been final. *Gowen, ex parte*, 4 Glf. 61.

2. *Certiorari* is the proper remedy for a wrong direction of the Court C. Pleas, on a complaint under this statute. *Drowne vs. Stimpson*, 2 Mass. 441; *Gile vs. Moore*, 2 Pick. 386.

Provided, That no woman shall be admitted as a witness as aforesaid, who has been convicted of any crime, which would by law disqualify her from being a witness in any other cause : *And provided also*, That no woman after she has made an application as aforesaid to a Justice of the Peace for a prosecution against the putative father of a bastard child, and after such Justice has taken her accusation and examination on oath, shall be allowed to make any settlement with such father, or give any discharge, which shall be given in evidence on the trial of any such complaint to affect or bar the same, if it is objected to in writing by the overseers (g) of the poor of any town, interested in the maintenance and support of such mother or bastard child.

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Proviso as to the testimony of the woman.

Her settlement with or discharge of the man accused, after complaint made, not to be good, or offered in evidence, if objected to by the overseers of the poor, &c.

SECT. 2. *Be it further enacted*, That any Justice of the Peace in any county, in this State, may issue his warrant (h), directed to the proper officer in his own county on any such complaint made on oath, and accompanied by the accusation and examination of such woman, directed to and made before any other Justice of the Peace ; and such Justice, so issuing his warrant, may proceed to require of the man accused, when apprehended and brought before him, a bond with sufficient sureties as in this act is provided, conditioned for his appearance at the Circuit Court of Common Pleas next to be holden in the county where the complaint was made. [Approved February 14, 1821.]

Any Justice may issue a warrant to arrest the accused, on complaint on oath, accompanied by the accusation and examination taken before another Justice.

[Ib. § 3.]

Same proceedings to be had.

Additional Act, ch. 487, vol. 3, p. 335.

Chapter 73.

AN ACT to establish Courts of Sessions.

[Repealed by ch. 306, vol. 3, p. 146.]

SECT. 1, established the Court of Sessions.*

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(g) The only implication arising from this provision is, that the mother is at liberty to institute a prosecution, or not, at her pleasure ; but she cannot settle it against the will of the overseers. *Dennett vs. Nevers*, 7 Glf. 403. See note § 21, ch. 122, vol. 2.

(h) By ch. 244, vol. 3, p. 74, officers having the warrant of a Justice in such case, may pursue and apprehend the defendant in any county in the State.

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SECT. 2, prescribed the times and places of their sittings.

SECT. 3, transferred all matters pending in the pre-existing Courts of Sessions,* to the jurisdiction and decision of this Court.

SECT. 4, prescribed the pay of the Court.

SECT. 5, authorized less than a quorum of the Court to adjourn, in the absence of the rest.

SECT. 6, repealed all laws inconsistent with this act.]

[Approved June 27, 1830.]

Additional Act, ch. 202, Vol. 3, p. 22.

Chapter 74.

AN ACT to alter the time for holding the Court of Sessions for the county of Oxford.

[Repealed by re-enactment, by ch. 806, § 2, vol. 8, p. 147.]

[Approved March 19, 1821.]

Chapter 75.*

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AN ACT determining the times and places for holding the Circuit Court of Common Pleas in the county of York.

[Repealed by ch. 193, § 11, 14, vol. 8, pp. 16, 17.]

[Approved March 17, 1821.]

See Act, Feb. 27, 1833, ch. 65.

Chapter 76.

AN ACT describing the power of Justices of the Peace in Civil and Criminal Cases.

General jurisdiction of Justices of the Peace, and their duty in criminal cases,

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That it shall be within the power, and be the duty of every Justice of the Peace within his county, to punish (a) by fine not exceeding

(a) In a proceeding before a Justice of the Peace for an offence, the fact must be strictly charged, but a rigid adherence to forms will not be required. *Com. vs. Messenger*, 4 Mass. 462.

five dollars, all assaults and batteries (b) that are not of a high and aggravated nature, and to examine into all homicides, murders, treasons, and felonies done and committed in his county,* and commit to prison all persons guilty, or suspected to be guilty of manslaughter, murder, treason or other capital offence; and to cause to be staid and arrested, all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State, or such others as may utter any menaces or threatening speeches; and upon view of such Justice, confession of the delinquent, or other legal conviction of any such offence, shall require of the offender to find sureties (c) to appear and answer for his offence, at the Supreme Judicial Court, or Circuit Court of Common Pleas, next to be held within or for the same county, at the discretion of the Justice, and as the nature or circumstances of the case may require; and for his keeping the peace, and being of good behaviour, until the sitting of the Court he is to appear before; and to hold bail (d) all persons guilty or suspected to be guilty (e) of lesser offences which are not cognizable by a Justice of the Peace; and require sureties for the good behaviour (f) of dangerous and disorderly persons; and commit (g) all such persons as shall refuse so to

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in arresting,
trying, recog-
nising and
committing
offenders.
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[Mass. Stat.
Mar. 16, 1784,
§ 1.]

(b) A feme covert is not indictable for an assault and battery, committed in the company and by the command of her husband. *Com. vs. Neil & ux.* 10 Mass. 152.

(c) Ch. 242, vol. 3, p. 72, prescribes the form of a recognizance in such case.

(d) Offences which may be prosecuted as well by action or information *qui tam*, as by indictment, are not comprehended by § 1, and where the regular commencement of the *qui tam* prosecution will defeat a prosecution by indictment subsequently commenced. *Com. vs. Cheney*, 6 Mass. 349.

(e) The words "guilty or suspected to be guilty," are equivalent to, accused or charged with crime. And the jurisdiction of Justices under this section does not extend to a person who has escaped imprisonment after conviction. *Com. vs. Otis*, 16 Mass. 199.

(f) A Justice cannot require one to find sureties to keep the peace only until the next Court. *Com. vs. Ward*, 4 Mass. 497; *Com. vs. Morey*, 8 Mass. 78.

(g) A *mittimus* or warrant of commitment from a Justice of the Peace,

CH. 76. recognize, and find such surety or sureties as aforesaid ; and take cognizance of, or examine into all other crimes, matters and offences, which by particular laws are put within his jurisdiction (*h*).

Breachers of the bye-laws of towns may be prosecuted before Justices of the Peace.

[Mass. Stat. Mar. 3, 1902.]

Persons aggrieved may appeal to the C. Court of Com. Pleas,

[Mass. Stat. Mar. 16, 1784, § 3.]

[*354] and produce copies of case at C. C. Com. Pleas. Failing to prosecute his appeal, his default to be entered.

SECT. 2. *Be it further enacted,* That all fines and forfeitures accruing for the breach of any bye-law, in any town within this State, may be prosecuted for, and recovered before any Justice of the Peace in the town or county where the offence shall be committed, by complaint or information, in the same way and manner other criminal offences are prosecuted before the Justices of the Peace within this State.

SECT. 3. *Be it further enacted,* That any person aggrieved at the sentence given against him, by any Justice of the Peace, may appeal therefrom to the next Circuit Court of Common Pleas to be held within the same county, and shall, before his appeal is granted, recognize (*i*) to the State in such reasonable sum, not less than twenty dollars, as the Justice shall order, with sufficient surety or sureties for his prosecuting his appeal ; and shall be held to produce the copy of the* whole process, and of all writings filed before the Justice, at the Court appealed to. And if he shall not there prosecute his appeal, and produce the copies as aforesaid, the Court shall order his default to be noted upon their record. And the said Court may order the same case to be laid before the Grand Jury, or may issue an attachment against the body of such appellant, and cause him thereby to be brought

ought to recite the complaint on which it is founded. *Com. vs. Ward*, 4 Mass. 497.

(*h*) A plea of an acquittal by a Justice of the Peace, was holden to be a sufficient bar to an indictment for the same assault and battery, which alleges that the life of the person beaten was put in danger. *Com. vs. Cunningham, & als.* 13 Mass. 245 ; *Com. vs. Goddard*, ib. 455.

(*i*) 1. A recognizance for the appearance of the party in a criminal prosecution, should state in substance all the proceedings which show the authority of the magistrate or court to take it. *State vs. Smith*, 2 Glf. 62 ; *Com. vs. Downey*, 9 Mass. 520 ; *Com. vs. Daggett*, 16 Mass. 447.

2. Ch. 242, vol. 3, p. 72, prescribes the form of a recognizance in such case.

3. See onward, § 10, note 1.

before them, and when he is so in Court, shall affirm the sentence of the Justice against him, with all additional costs.

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SECT. 4. *Be it further enacted*, That each Justice shall have authority to command the assistance of every Sheriff, Deputy Sheriff, Constable, and all other persons present at any affray, riot, assault or battery, and may fine any person refusing such assistance, in a sum not exceeding six dollars; to be disposed of for the use of the town where the offence shall be committed; and levied by warrant of distress on the offender's goods and chattels, and for want thereof on his body.

Justices may command assistance of sheriff, deputies and constables at riots, affrays, &c.

[Ib. § 2.]

SECT. 5. *Be it further enacted*, That any Justice of the Peace for the preservation thereof, or upon view of the breach thereof, or upon view of any other transgression of law, proper to his cognizance, done or committed by any person or persons whatever, shall have authority, (in the absence of the Sheriff, Deputy Sheriff or Constable,) to require any person or persons to apprehend and bring before him such offender or offenders. And every person so required, who shall refuse or neglect to obey the said Justice, shall be punished in the same manner as for refusing or neglecting to assist any Sheriff, Deputy Sheriff or Constable in the execution of his office as aforesaid. And no person who shall refuse or neglect to obey such Justice, to whom he shall be known; or declare himself to be a Justice of the Peace, shall be admitted to plead excuse on any pretence of ignorance of his office.

Justices may, on their own view, (in absence of sheriff, deputies, or constables) require any person to apprehend offenders. [Mass. Stat. Feb. 26, 1796, § 3.]

Penalty for refusing to obey such Justice.

If the Justice be known or declared, plea of ignorance of his office not admissible.

SECT. 6. *Be it further enacted*, That Justices of the Peace within their respective counties, be, and they are hereby authorized and empowered to grant subpoenas for witnesses in all criminal causes pending before the Supreme Judicial Court and Circuit Court of Common Pleas, and before themselves* or any other Justice: *Provided*, That no Justice of the Peace shall grant subpoenas for witnesses to appear in any Court, except before himself, to testify on behalf of the State, unless by the request of the Attorney General or County Attorney. And all Sheriffs, Constables and other officers are directed and empowered to serve any warrant issuing from a Justice of the Peace.

Justices may subpoena witnesses in criminal cases:

[Mass. Stat. Mar. 16, 1784, § 2.]

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But not on behalf of the State without consent of Attorney General, or County Attorney, except before himself.

SECT. 7. *Be it further enacted*, That the Justices of the

CH. 76. Peace shall account annually with the Treasurer of the State, the Treasurer of their respective counties, and the town Treasurer, as the case may be, for all fines by them received or imposed, upon pain of forfeiting the sum of thirty dollars, to be sued for and recovered by the Treasurer of the State, the county or town Treasurer for the time being, to which the said fines may respectively belong.

Justices to account annually to State, County and Town Treasurers for fines, &c.
[Mass. Stat. Mar. 16, 1784, § 4.]

Justice's jurisdiction in civil actions, (where title to real estate is not in question) to extend to 20 dollars.

[Mass. Stat. Mar. 11, 1784, § 1.]

Justices may issue summons, capias, attachment, &c.

—to be served seven days before trial.

Proceedings before Justice.

Judgment, &c. if plaintiff prevail.

Damages not to exceed 20 dollars.

Judgment in case defendant prevail.

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SECT. 8. *Be it further enacted,* That all (j) civil actions, wherein the debt or damage does not exceed twenty dollars (and wherein the title of real estate is not in question, and specially pleaded by the defendant) shall, and may be heard, tried, adjudged and determined by any Justice of the Peace within his county ; and the Justices are severally empowered to grant summons, capias and attachment, at the request of any person applying for the same, directed to some proper officer within the same county, empowered by law to execute the same. And such summons or capias and attachment shall be duly served by such officer, seven days at the least before the day therein set for trial, otherwise the party sued shall not be held to answer thereon ; and if after such process shall be duly served, the party sued, after being duly called, shall not appear to answer to the same suit, the charge against him in the declaration shall be taken to be true, and the Justice shall give judgment against him for such damages as he shall find the plaintiff to have sustained, with costs ; and if the person sued shall appear to defend the suit or oppose the same, the Justice shall award such damages as he shall find the plaintiff to have sustained : *Provided*, That no more damages than the sum of twenty dollars, shall be awarded in any action originally brought or tried before a Justice of the Peace ; but if the plaintiff shall not support his action, shall fail to prosecute, or become nonsuit, the Justice shall* award to the party sued, his reasonable costs, taxed as the

(j) An action for an injury done to real estate, if the damage does not exceed twenty dollars, may be brought before a Justice of the Peace in the county where the wrong doer may be found, although the estate injured does not lie in that county ; and upon a plea of title, the action may be carried to the Court of Common Pleas for the same county. *Sumner vs. Finegan*, 15 Mass. 280 ; *Pitman vs. Flint*, 10 Pick. 504.

law directs. And upon all judgments given by a Justice of the Peace in civil actions, he shall award execution (k) thereon in form by law prescribed. CH. 76.

SECT. 9. *Be it further enacted*, That the amount of the sum or several sums, specified, expressed or supposed to be demanded by the plaintiff in his declaration, shall not be considered as any objection against the Justice's jurisdiction, provided the ad damnum, or damage is not laid or stated to exceed twenty dollars. Justice's jurisdiction not to exceed 20 dollars.
[Mass. Stat. June 22, 1797, § 2.]

SECT. 10. *Be it further enacted*, That any party aggrieved at the judgment of any Justice of the Peace, in a civil action, where both parties have appeared and plead, may appeal therefrom to the next Circuit Court of Common Pleas to be held within the same county; and shall before his appeal is allowed, recognise with a surety or sureties (l), in such reasonable sum as the Justice shall order, not exceeding thirty dollars, to pay all intervening damages and costs, and to prosecute his appeal with effect; and shall be held to produce a copy of the whole case, at the Court appealed to, and both parties shall be allowed to offer any evidence upon the trial at the Circuit Court of Common Pleas, in the same manner as if the cause had been originally commenced there. Party aggrieved may appeal to C. C. Com. Pleas.
[Mass. Stat. Mar. 11, 1784, § 6.]
—Must recognise to prosecute,
and produce copies at C. C. C. Pleas.
Proceedings in that Court.

(k) The writ of execution is not essential to the judgment, or to the right of the party established by the judgment. *McNeil vs. Bright*, 4 Mass. 289.

(l) 1. It is not necessary that the party appealing should personally enter into recognizance for the appeal. If it be done by sureties, it is as if done "with sureties," within the meaning of this statute. *Vallance vs. Sawyer*, 4 Glf. 62.

2. A writ of *scire facias* on a recognizance to prosecute an appeal should be issued originally from the Court appealed to. *Ib.*

3. In debt upon a recognizance to a party taken before a Justice of the Peace, conditioned for prosecuting an appeal, it must be shown that the Justice had jurisdiction of the action, and that the recognizance has been entered of record in the C. C. Pleas: and the condition must be set forth, and the breach alleged. *Bridge vs. Ford, Jr.* 4 Mass. 641; *same vs. same*, 7 Mass. 209. So in *scire facias*, *State vs. Smith*, 2 Glf. 62.

4. It is the duty of the Justice to transmit the recognizance to the Court appealed to, that it may be entered of record. *Ib.*

5. A Justice of the Peace was fined for not returning a recognizance taken by him, until the second day of the term. *Neal, ex parte*, 14 Mass. 205.

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No further appeal.
Defendant in trespass failing to bring forward the action according to his recognisance.—Plaintiff to have his damages.

Appellant failing to prosecute, on complaint judgment may be affirmed.

In trespass when defendant pleads title to real estate—mode of proceeding before Justice.

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[Ib. § 2.]

And no other appeal shall be had on such action after one trial at the Circuit Court of Common Pleas. And the Circuit Court of Common Pleas, when any person recognized as before mentioned to bring forward an action of trespass, doth neglect to do it, upon complaint thereof made in writing by the plaintiff, shall give judgment for such sum in damages, as the plaintiff hath declared for, together with all reasonable costs which accrued both in the same Court and before the Justice. And the Circuit Court of Common Pleas shall, when any appellant thereto shall fail to prosecute his appeal (m), or if he shall neglect to produce a copy of the case, affirm the former judgment upon the appellee's complaint, and award such additional damages as shall have arisen in consequence of the said appeal, and cost.

SECT. 11. *Be it further enacted*, That when an action of trespass (n) shall be brought before any Justice of the Peace, and the defendant shall plead the general issue, he shall not be allowed* to offer any evidence that may bring the title of real estate in question. And when the defendant in any (o) such action shall plead the title of himself or any other person in justification, the Justice upon having such plea (p) plead, shall order the defendant to recognise to the

(m) See ante, p. 383, note n, 2.

(n) Such an action, having been tried upon review in the C. C. Pleas, may be brought into the S. J. Court by appeal, though no plea of soil and freehold was filed before the magistrate, the defendant having been accidentally defaulted. *Murray vs. Ulmer*, 5 Glf. 126. See *Blood vs. Kemp*, 4 Pick. 169, onward, § 11.

(o) This provision comprehends all actions of trespass, as *de bonis asportatis*, &c. and not merely trespass *quare clausum fregit*. *Blood vs. Kemp*, 4 Pick. 169.

(p) 1. Such plea, without any replication from the plaintiff, puts an end to the magistrate's jurisdiction over the cause; except that he must take the recognizance of the party for its prosecution in the Court of Common Pleas, where the pleadings are to be closed. *Low vs. Ross*, 3 Glf. 256.

2. When defendant pleads that he entered his adjoining close and erected a fence, the plea is not within the statute, and the justice has jurisdiction. *Wood vs. Prescott*, 2 Mass. 174.

3. A right of way, either public or private, over another's land, is real

adverse party in a reasonable sum, with sufficient surety or sureties to enter the said action at the next Circuit Court of Common Pleas to be holden within the same county, and to prosecute the same in the same manner as upon an appeal from a Justice's judgment; and if such pleader shall refuse so to recognise, the Justice shall render judgment against him, in the same manner as if he had refused to make answer to the same suit. And either party in such cause, shall be allowed to appeal from the judgment of the Circuit Court of Common Pleas, in the same manner as if the suit had been originally commenced there.

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Appeal allowed in such cases from C. C. Pleas to S. J. Court.

SECT. 12. *Be it further enacted*, That in all (q) civil actions triable before a Justice of the Peace, except such actions of trespass wherein the defendant means to avail himself, by pleading the title of himself or any other person under whom he claims in justification of the trespass or trespasses alleged to be committed on real estate; the defendant shall be entitled to all evidence, under the general issue, which by law he might avail himself of under any special plea in excuse or justification (r), any law, usage or custom to the contrary notwithstanding.

General issue may be plead in all actions before Justices and special matter given in evidence except where title to real estate is relied on by defendant.

Ib. § 7.1

estate within the meaning of the statute. *Spear vs. Bicknell*, 5 Mass. 129; *Strout & al. vs. Berry*, 7 Mass. 387.

4. In an action thus carried to the Common Pleas, the plaintiff had leave to amend his declaration, by alleging any other torts on the same close, or by giving a more accurate description of the close. *Cummings vs. Rawson*, 7 Mass. 440.

5. If the Justice refuses to receive such plea when offered, the defendant might to appeal from such refusal; but where, instead of appealing, he pleaded the general issue, and after a trial and judgment against him, appealed from this judgment, and the Court of Common Pleas, upon motion, gave him leave to file his plea of title, it was held that the proceeding of that Court was correct. *Blood vs. Kemp*, 4 Pick. 169. See ante, § 8, note j.

6. In an action of trespass, brought before a Justice of the Peace and removed into the Court of Common Pleas by a plea of title to land, an appeal lies from the Court of Common Pleas to this Court, such action being, within the intent of the legislature, a real action, for the purposes of an appeal. *Ib.*

(q) Replevin is not a civil action within a reasonable construction of this section. Cases within this section must be those where a verdict finding the general issue, and a judgment on the verdict, will do justice to the parties. *Holmes vs. Wood*, 6 Mass. 3.

(r) Under this provision the defendant may avail himself of the statute of

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Justices may grant subpoenas in all civil actions.
[Ib. § 2 & 5.]

May adjourn their Courts by proclamation;

No justice to be of counsel in any suit before himself.

In case of waste by executor or administrator, Justice may proceed as C. C. C. Pleas may in such cases.
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[Ib. § 4.]

Justice to keep record of his proceedings. When Justice shall die, before a judgment given by him is satisfied, what proceedings to be had.

[Ib. § 3.]

SECT. 13. *Be it further enacted*, That each Justice of the Peace may grant subpoenas for witnesses in all civil actions and causes pending before the Supreme Judicial Court, Circuit Court of Common Pleas, Court of Sessions, and before him or any other Justices, and in all civil actions and causes pending before arbitrators or referees. And every Justice of the Peace shall have power by public proclamation to adjourn the trial of any action brought before him, from time to time, when equity may require it; but he shall not be of counsel to either party, or undertake to advise or assist any party in suit before him.

SECT. 14. *Be it further enacted*, That when an executor or administrator shall be guilty of committing waste, whereby* he is rendered unable to pay the judgment recovered before any Justice of the Peace, against the goods and estate of the deceased in his hands, out of the same, the Justice may proceed against the proper goods and estate of such executor or administrator, in the same manner as the Circuit Court of Common Pleas are empowered to do.

SECT. 15. *Be it further enacted*, That each Justice of the Peace shall keep a fair record (s) of all his proceedings; and when any Justice of the Peace shall die before a judgment given by him is paid and satisfied, it shall be in the power of any Justice of the Peace in the same county to grant a scire facias upon the same judgment, to the party against whom such judgment was rendered up, for him to show cause if any he hath, why execution should not be issued against him. And although the costs and debt awarded by the deceased Justice when added together, shall amount to more than twenty dollars, it shall be no bar upon such scire facias, but judgment shall be given thereon for the whole debt and cost, together with the cost arising upon the scire facias.

limitations by pleading the general issue; the words "excuse or justification," mean every matter which may bar the plaintiff's right to recover, whether requiring a special plea by the common law, or not. *Williams & al. vs. Root*, 14 Mass. 273.

(s) If the record of a judgment of a justice refer to the writ on file, the court, on error to reverse the judgment, will consider the declaration in such writ as a part of the judgment. *Clap vs. Clap*, 4 Mass. 520.

Provided always, That either party may appeal from the judgment as in other personal actions, where judgment is given by a Justice of the Peace. And every Justice of the Peace who shall have complaint made to him, that a judgment given by a Justice of the same county then deceased, remains unsatisfied, shall issue his summons to the person in whose possession the record of the same judgment is, directing him to bring and to produce to him the same record; and if such person shall contemptuously refuse to produce the same record, or shall refuse to be examined respecting the same, upon oath, the Justice may punish the contempt by imprisonment, until he shall produce the same, or until he submits to be examined as aforesaid; and when the Justice is possessed of such record, he shall transcribe the same upon his own book of records, before he shall issue his scire facias; and shall deliver the original back again to the person who shall have produced it, and a copy of such transcription, attested by the transcribing Justice, shall be allowed in evidence in all cases, where an authenticated copy of the original might be received.

SECT. 16*. *Be it further enacted*, That all Justices of the Peace before whom actions may be commenced under former commissions, and such commissions shall expire before judgment shall be rendered thereon, or judgment being rendered, the same remains in whole or in part unsatisfied, such Justices of the Peace who shall hereafter have their said commissions seasonably renewed, and being duly qualified agreeably to the Constitution of this State, to act under such commissions, be and they hereby are authorized and empowered to render judgment, and issue execution on all such actions, commenced as aforesaid, in the same manner as if the commissions under which such actions may be commenced, were in full force. [Approved March 15, 1821.]

See ch. 244, vol. 3, p. 74, and ch. 448, ib. p. 292.

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Appeal allowed to either party. Justice to whom complaint is made in such cases, may summon the person possessing the record to produce it. Punishment for refusal so to do.

Duty of the Justice when the record is produced, to transcribe it into his own records.

Copy of such transcript to be evidence.

[*359] Justices, whose commissions expire before judgment or satisfaction, may proceed, under a new commission, if seasonably obtained, to render judgment, &c.

[Mass. Stat. June 20, 1788, § 2.]

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Chapter 77.

AN ACT providing a speedy Method of recovering Debts, and for preventing unnecessary costs attending the same.

Justices may take recognisances for debts.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That every Justice of the Peace in this State shall have power within his county to take recognisances (a) for the payment of debts of any person who shall come before him for that purpose : which recognisance may be in substance as follows :—

Form of recognisance.

Know all men, that I, A B of —, in the county of —, do owe unto C D of —, the sum of —, to be paid to the said C D on the — day of —; and if I shall fail of the payment of the debt aforesaid, by the time aforesaid, I will and grant that the said debt shall be levied of my goods and chattels, lands and tenements, and in want thereof of my body. Dated at —, this — day of —, in the year of our Lord —. Witnes, my hand and seal — A B.

— ss. Acknowledged the day and year last abovesaid. Before E F Justice of the Peace (b).

To be recorded by the Justice.

SECT. 2. *Be it further enacted*, That every Justice of the Peace taking any such recognisance, shall immediately record the same at large in a book to be kept by him for that purpose ; and after the same is recorded, may deliver it to* the Conusee ; and upon the Conusee's lodging the same with the said Justice, at any time within three years from the time when the same is payable, and requesting a writ of execution, it shall be the duty of such Justice to issue a writ of execution (c) thereon for such sum as shall appear to be due on the same ; which writ of execution shall be in substance as follows :

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Execution may issue thereon within 3 years.

STATE OF MAINE.

(SEAL.) To the Sheriff of the county of —, or his deputy, or either of the Constables of the town of —, in said county, Greeting.

Form of execution.

Because A B of —, in the county of —, on the — day of —, in the year of our Lord — before E F Esq. one of the Justices of the Peace for the said county of —, acknowledged that he was indebted to C D of —, in the

(a) A Justice of the Peace, in taking a recognizance, and in issuing an execution, exercises no judicial power, but acts merely as a ministerial officer. *Albee vs. Ward*, 8 Mass. 84.

(b) Debt lies upon such a recognizance. *Green vs. Dana*, 13 Mass. 493. See note to § 3.

(c) The execution which issues upon a recognizance, as to the power which it confers and the duty which it imposes, is of the same nature as an execution which issues from the highest court of record. *Morton vs. Chandler*, 7 Gif. 46.

county of — in the sum of — which he ought to have paid on the — day of —, and — remains unpaid as it is said —: We command you therefore, that of the goods, chattels or real estate of the said A B within your precinct, you cause to be paid and satisfied unto the said C D at the value thereof in money, the sum last abovesaid, with —, for this writ; and thereof also to satisfy yourself your own lawful fee; and for want of goods, chattels or real estate of the said A B to be found within your precinct to the acceptance of the said C D to satisfy the sums aforesaid and your said fees; we command you to take the body of the said A B and him commit unto our gaol in our county of — aforesaid, there to be detained in the said gaol until he pay the full sums abovesaid, with your said fees; or that the said A B be discharged by the said C D the creditor, or otherwise by order of law: Hereof fail not and make due return of this writ with your doings therein unto the above named Justice within sixty days next coming. Witness, the said Justice at —, the — day of —, in the year of our Lord —, E F Justice of the Peace

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Which writ of execution the said Justice is authorized to direct to any proper officer or officers in any county in this State; who are hereby required to execute the same according to the precept thereof. And all such officers are hereby* declared liable for any malfeasance or misfeasance of which they may be guilty in relation to any such execution which may be delivered to them; which execution said Justice is authorized to renew at any time within one year from the time the last execution was returnable.

Power and duty of officer in serving it.

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Renewable in one year.

SECT. 3. *Be it further enacted*, That whenever three years shall have elapsed (d) after the time of payment limited by any such recognisance without any execution having been issued on the same, or whenever the Justice who took the same shall have deceased or removed from the State or become otherwise disqualified, the Conusee may have his action of debt on the same, in the same manner as a creditor is entitled to have his action on any judgment of any Court of record in this State. [Approved January 27, 1821.]

Conusee may sue on recognisance in certain cases.

(d) Debt lies on a recognizance taken pursuant to this statute as well before as after the expiration of the three years mentioned in § 3. *Cutts vs. King*, 1 Gif. 159.

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Chapter 78.

AN ACT for rendering the decision of Civil Causes as speedy and as little expensive as possible (a).

Persons having matter in dispute may refer the same by rule before Justice of the Peace.

[Mass. Stat. July 7, 1786, § 1 and 2.]

Demand in writing and signed.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That when any persons who may have a dispute, of what nature soever, shall agree to have the dispute determined by referees mutually chosen by the parties for the purpose, it shall and may be lawful for the person or persons making the demand in the action, to make out a particular statement (b) thereof under his or their hands in writing, and to lodge the same with some one Justice of the Peace (c); and the said Justice of the Peace, upon application of the parties for the purpose, shall make out an agreement to be annexed (d) to the aforesaid

(a) 1. Though the power of referees appointed under this statute, does not extend to cases in which the title to real estate comes in question, [*Fowler vs. Bigelow & al.* 8 Mass. 1.] yet a claim of damages occasioned by the making of a canal, not being of that character, comes within the scope of their authority. *Fryeburg Canal vs. Frye*, 5 Glf. 38.

2. The submission of an action, and all demands existing between the parties, to the determination of referees, dissolves any attachment of property made in that action; and this, whether their demands are in fact exhibited to the referees or not. *Mooney & ux. vs. Kavanagh & al.* 4 Glf. 277. See onward, note c, 7.

3. Such submission also operates as a waiver of all exceptions to the forms of process, or may be considered as a release of errors, or as an estoppel to the assignment of errors, in the proceedings anterior to such submission. *Forsaith vs. Shaw*, 10 Mass. 253.

(b) 1. Where a submission is of diverse subjects distinctly enumerated, if it appears from the whole award that all matters submitted have been adjudicated upon by the arbitrators it is sufficient, though each particular is not specified in the award. *Dolbear vs. Wing*, 3 Glf. 421.

2. A submission, once made a rule of court, is no longer countermandable by either party. *Cumberland vs. N. Yarmouth*, 4 Glf. 459.

(c) The justice who takes the acknowledgment of the parties to such rule cannot himself be one of the referees. *Drew vs. Canady*, 1 Mass. 158.

(d) 1. The demand must be annexed to the rule, or it will be void. *Bulard vs. Coolidge*, 3 Mass. 324.

2. So, if the demand annexed is not subscribed by the persons making it. *Manfield vs. Doughty*, 3 Mass. 393. But a demand annexed to a rule is sufficient, if in the hand writing of the party making it as "A. B. demands,"

demand, and to be by them or their lawful agents or attorneys, subscribed, and acknowledged in substance as follows :—

CH. 78:

Town of A — in the county of S —, 182 . Know all men, that A B of — in the county of — [addition] and C D of — in the county of — [addition] have agreed to submit the demand made by the said A B against the said C D which is hereto annexed, (and all other demands, as the cause may be,) to the determination of E F, G H and I K (e) the report of whom, or the major part of whom, being made as soon as may be to any Circuit Court of Common Pleas, to be holden in and for the said county of S —, judgment thereon to be final. And if either of the parties shall neglect to appear before the referees, after proper notice being given them, of the time and place appointed by the referees, for hearing the parties in this action, the referees shall have power to proceed ex parte. A B, C D, S —, 182 . Then the above named A B and C D personally appeared, and acknowledged the above instrument by them subscribed to be their free act. Before me, L M Justice of the Peace.

Form of submission,

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and acknowledgment.

SECT. 2. *Be it further enacted*, That the determination of the referees who may be appointed agreeably to this act, shall be made to the next (f) Circuit Court of Common

Report to be made to next C. C. C. Pleas. [Ib. § 3.]

&c. without being subscribed by him. *Humphrey vs. Strong*, 14 Mass. 262. So, where a demand on which a writ had been sued out and endorsed by the plaintiff, was referred, the annexation of the writ to the rule was holden a sufficient demand in writing, &c. *Inman vs. Wheeler*, 1 Pick. 504.

3. If a copartnership demand be signed by one of the copartners, it is a sufficient compliance with the statute. *Skilling vs. Coolidge & al.* 14 Mass. 43.

4. The report of referees cannot be made respecting any matters not contained in the agreement of submission. *Tudor vs. Peck*, 4 Mass. 242.

5. The statement of the demand must shew on what account and for what cause it is made, or the report will be void. *Jones vs. Hacker* 5 Mass. 264.

6. Where demands made by one party only are submitted to arbitrators, if a sum be awarded to the other party, no remedy lies on such award. *Worthen & al. vs. Stevens*, 4 Mass. 448.

7. When parties have submitted all demands, and judgment has been entered on the report of the referees including all the demands submitted to them, it is still competent for one of the parties to show that a particular demand, not being in dispute, was not laid before the referees, and to maintain an action on such demand. *Webster vs. Lee*, 5 Mass. 324.

(e) The reference must be to three referees. *Monosiet vs. Post & al.* 4 Mass. 532.

(f) 1. If the report be not made to the next court after the award, it will be void. *Mott vs. Anthony*, 5 Mass. 489; *Southworth vs. Bradford*, id. 524; *Bacon vs. Ward*, 10 Mass. 142. If the court had commenced its session previous to making the award, the report of the referees cannot be returned to and accepted at that term; and if it be, and judgment is render-

CH. 78. Pleas, to be holden in and for the county in which the Justice of the Peace may have lived at the time he issued the agreement as aforesaid; and the Circuit Court of Common Pleas to whom the report of the referees may be made as aforesaid, shall have cognizance thereof in the same way and manner, and the same doings shall be had thereon (g), as

ed thereon, such judgment will be reversed on writ of error. *Durrell vs. Merrill*, 1 Mass. 411.

2. But if the report be sensibly made, and recommitted, it may be received again either with, or without an amendment, at the same, or any subsequent term. *Whitney, adm. vs. Cook*, 5 Mass. 142; *Boardman vs. England*, 6 Mass. 71.

3. If the referees agree upon their report during a session of the court, such report is regularly to be returned at the next succeeding term of the court. *Walker vs. Melcher*, 14 Mass. 148.

4. Where the referees agreed upon their report before the sitting of the court to which it was returned, but had signed and dated it on the second day of the term, they were not allowed to amend, by altering the date so as to make it returnable at the time intended. *Noyes vs. Noyes*, 1 Pick. 269. See *Gerrish vs. Moras*, 2 Pick. 625.

(g) 1. It is no valid objection to a report of referees, that one of them had formed a previous opinion upon the case submitted to them, if his mind appears to have been still open to conviction, and no imputation of unfairness rests upon him. *Graves vs. Fisher & al.* 5 Gif. 69. Nor is the partiality of a referee a valid objection, if known and not objected to by the party before the hearing was had. *Fox vs. Hazelton*, 10 Pick. 275.

2. Reports of referees, whether made under a rule of court, or under a submission before a justice, pursuant to the statute, may be recommitted by the court at their discretion, as well for the revision of the whole case, as for the amendment of matters of form. *Cumberland vs. N. Yarmouth*, 4 Gif. 459.

3. If the report be recommitted the referees are not obliged to alter it, but may again return it, without hearing the parties; if they are fully satisfied of the correctness of it. *May & al. vs. Haven*, 9 Mass. 325.

4. If a report made by three referees be recommitted, and one of them neglect or refuse to sit again, the other two are competent to make a new award similar to the former, with additional costs. *Peterman vs. Loring*, 1 Gif. 64.

5. If the referees, or one of them in case of a recommitment, should refuse to re-examine the subject, the court may enforce obedience to the order of recommitment, by mandamus, or attachment. *Cumberland vs. North Yarmouth*, 4 Gif. 459.

6. After the recommitment of a report, it is not competent for two of the

though the same had been made by referees appointed by a rule of the same Court. CH. 78.

SECT. 3. *Be it further enacted*, That where the parties shall agree that the determination of the referees may be made known, prior to its being made to the Circuit Court of Common Pleas as aforesaid, it shall and may be lawful for the referees to make known the determination to the parties, without its affecting in any degree the validity thereof; and if the determination shall be so made known to the parties, it shall and may be lawful for the party who may be found indebted agreeably to the determination aforesaid, to discharge him or themselves therefrom, and thereby prevent any further process thereon, by paying the same unto the person or persons to whom it may be so awarded.

Report may by consent of parties be made known to them before Court;

[Ib. § 4.]

and sum awarded paid.

SECT. 4. *Be it further enacted*, That the referees who may be appointed in pursuance of this act, shall be vested with all the authority, which is possessed by referees appointed by a rule of Court. And witnesses (h) shall be summoned to appear before them, and be sworn in the same manner* as witnesses before referees appointed by a rule of Court as aforesaid.

Power of referees.

[Ib. § 5.]

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SECT. 5. *Be it further enacted*, That upon any report of referees returned into any Circuit Court of Common Pleas, in pursuance of this act, and also upon any report made by

Judgment on reports of referees to be final.

referees, in the absence of the third, to revise the *essential merits* of the case. *Ib*; *Short vs Pratt*, 6 Mass. 496.

7. If arbitrators erroneously refuse to consider a particular demand laid before them, on the mistaken ground that it is not within the submission, the bond and award are no bar to subsequent action upon the demand thus rejected. *Bisby vs. Whitney*, 5 Glf. 192.

8. A report of referees may be good in part, and bad in part. *Com. vs. P. Proprietors*, 7 Mass. 420.

9. If the court refuse to accept a report for defect of authority in the referees, they cannot award costs, but must order the parties to go thereof without day. *Jones vs. Hacker*, 5 Mass. 264.

10. An award that the defendant recover the costs of action, is a sufficient determination of the matter submitted; and warrants a judgment that the plaintiff take nothing by his writ. *Buckland vs. Conway*, 16 Mass. 396.

(h) Referees may examine an interested witness. *Fuller vs. Wheslock*, 10 Pick. 135.

CH. 80. referees appointed by a rule of any Circuit Court of Common Pleas, wherein it is agreed, at the time of entering into such rule, that the report of said referees shall be final, the judgment of said Circuit Court of Common Pleas, shall be final accordingly(i). [Approved January 27, 1821.]

[Mass. Stat.
Mar. 3, 1792.]

Additional Act, ch. 262, Vol. 3, p. 91.

Chapter 79.

AN ACT directing the proceedings against Forcible Entry and Detainer. (a)
[Repealed, by ch. 268, § 5, vol. 3, p. 96.]

[Mass. Stat.
June 30, 1784.]

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SECT. 1, Provided that two Justices of the Peace, quorum unus, may inquire and decide cases of forcible entry and detainer, by jury.

SECT. 2,* Provided mode of procedure by complaint.

SECT. 3,* Provided for verdict to be signed by all the jurors. Took away the right of appeal, but left the proceedings open to removal by certiorari.

SECT. 4, Made tenants holding over their terms, liable to this process.]

[Approved February 5, 1821.]

(i) 1. A bill of exceptions will not lie [*Dean vs Dean*, 2 *Pick.* 25,] nor a writ of review, upon a judgment rendered on report of referees under a submission before a Justice of the Peace. *Dickenson vs. Davis*, 4 *Mass.* 520; *Borden vs. Brown*, 7 *Mass.* 93. See *Stone & als. vs. Davis & als.* 14 *Mass.* 360. But a writ of error lies in such case. *Short vs. Pratt & al.* 6 *Mass.* 496; *Lyman vs. Arms & al.* 5 *Pick.* 213. See *Miller vs. Miller*, 2 *Pick.* 570.

2. It is not erroneous for the court to enter judgment for less than the award of the referees, the party in whose favor the award is made, having released the difference. *Phelps vs. Goodman*, 14 *Mass.* 252.

(a) 1. A mere refusal to deliver possession of land when demanded, is not a foundation for this process. There must be some apparent violence, in deed or in word, to the person of another, or some circumstance tending to excite terror in the owner, and to prevent him from maintaining his right. *Com. vs. Dudley*, 10 *Mass.* 403.

2. See ante, ch. 53, note c, p. 289; also, ch. 268, vol. 3, p. 95.

Chapter 80.*

CH. 80.

AN ACT directing the mode of process, to be adopted in replevying of Cattle or Beasts distrained, and also of goods and Chattels.

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SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, (a) That when any person shall have his cattle restrained or impounded, in order to obtain satisfaction for damages they may have committed, or to obtain a forfeiture, supposed to have been incurred for their going at large out of the inclosure of the owner, in violation of law, in order to have the legality of such distraint or impounding determined, he may have and prosecute a writ (b) of replevin for the liberation of the cattle thus impounded, in the form prescribed by law.†

Owner of cattle impounded may have writ of replevin.
[Mass. Stat. June 25, 1789, § 1.]

[† Ante, p. 391.]

SECT. 2. *Be it further enacted,* That when it shall appear from the plea of the defendant in replevin, that the cattle were taken and impounded, damage feasant, or for the recovery of a penalty incurred for their being found going at large, out of the inclosure of the owner, in violation of law; and upon the issue it shall be determined that the cause of taking and detaining was lawful and justifiable, judgment shall, instead of a return of the cattle, be rendered for the defendant in replevin, to recover such reasonable damages, as upon a consideration of the circumstances of the case, the Justice (or a Jury in case it comes before one,) shall assess, together with his costs of taking and impounding, and costs of defence: but if upon the trial of the issue, it shall appear, that the cattle were taken or detained without sufficient and justifiable cause, the plaintiff in replevin shall recover such reasonable damages for the taking and detaining, as the Justice, (or Jury, in case it comes before one,) shall assess, together with his costs: but when, from the matter of the

In certain cases judgment for defendant's damages may be given, instead of return, if legally taken.

[Ib. § 2.]

If illegally taken, plaintiff shall have damages.

In certain cases defendant

(a) 1. This statute has so far altered the common law, that an action of replevin may be maintained for goods unlawfully detained, though the original taking was lawful. *Seaver vs. Dingley*, 4 Glf. 306; *Marstin vs. Baldwin*, 17 Mass. 606.

2. One deputy sheriff, may have replevin against another deputy of the same sheriff, for goods which he claims by virtue of a prior attachment made by him. *Gordon vs. Jenny*, 16 Mass. 465.

(b) The writ must be endorsed. And if the defendant pleads the want of an endorser in abatement, without any suggestion entitling him to the possession of the goods, and the writ is abated, judgment shall be for costs only, and not for a return. *Gould vs. Barnard*, 3 Mass. 199.

CH. 80.

may have return instead of damages.

plea of the defendant in replevin, damages with propriety cannot be assessed, or that a restoration of the property replevied is the best recompense the parties can have, and upon the issue it shall be found, that the cattle were taken and detained lawfully, and for justifiable cause, the judgment shall be rendered, that the cattle be returned and restored to the defendant, irrepleviable, and for costs, and he be entitled to a writ of return and restitution accordingly.

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When from plea it appears that the damages demanded exceed \$20,

[Ib. § 2.]

what proceedings are to be had.

SECT. 3.* *Be it further enacted*, That when it shall appear from the plea or avowry of the defendant in replevin, that the sum demanded in damage for the taking and detaining exceeds twenty dollars, or that the property of the beast taken, is the question between the parties (in case the value exceeds twenty dollars) or that the right to soil and freehold is coming in question in every such case, the Justice shall not proceed to try the issue, but shall order the defendant in replevin to recognise in a reasonable sum, with sufficient surety or sureties, to the adverse party, to enter the said action at the next Circuit Court of Common Pleas or the Supreme Judicial Court, to be held in the same county, as the plaintiff in replevin shall then and there elect and choose, and to prosecute the same to effect; and if such defendant in replevin shall neglect or refuse thus to recognise, the Justice shall render judgment against him in the same manner as if he refused to make answer to the same suit. And in case such defendant shall, after recognizing fail of entering or prosecuting the same action, the plaintiff may enter and prosecute the action, or have his remedy on the recognizance, at his election.

When goods are taken, distrained, attached or detained, and claimed by third person, form of proceeding.

[Ib. § 4]

SECT. 4. *Be it further enacted*, That when any goods or chattels shall be taken, distrained, attached, or unlawfully detained, which shall be claimed by a third person, and the person thus claiming the same, shall think proper to replevy them, in case such goods and chattels are of the value of more than twenty (c) dollars, he may take out and prosecute his

(c) 1. The jurisdiction of the C. C. Pleas in such case is regulated by the real value of the goods, not by such price as the plaintiff may choose to affix to them:—and if an excessive value be alleged in the writ for the purpose of giving jurisdiction, the defendant may avail himself of it in abatement. *Small*

writ of replevin from the Clerk's office of the Circuit Court of Common Pleas, in the county where the goods and chattels are thus taken, distrained or attached in form prescribed by law. And in case the plaintiff in replevin shall neglect to enter and prosecute (d) the suit, the defendant may upon complaint have judgment for a return and restoration of the goods and chattels replevied, and the damages for the taking to the amount of six per cent. (e) on the bond, with reasonable costs, and a writ of return and restitution thereupon accordingly. And if upon a trial of the issue, judgment shall be rendered for a return and restitution, the interest of six per cent. upon the penal sum of the bond, shall be taken as a rule for estimating the plaintiff's damages, in case they were* taken on execution. And if the taking shall have been upon execution, the goods and chattels returned shall be held responsible for the space of twenty days after the return;

Mode of assessing damages in different cases.

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vs. Swain, 1 *Glf.* 133. See ch. 443, vol. 3, p. 295, investing Justices of the Peace with jurisdiction in actions of replevin in certain cases; also, statute passed Feb. 28, 1833.

2. The action of replevin is local in its nature, and must be brought in the county where the goods and chattels are taken or attached. *Robinson vs. Mead*, 7 *Mass.* 353.

3. It is no sufficient plea to a writ of replevin, that the chattels replevied had been before delivered to the defendant upon his writ of replevin against a third person; nor that the same officer, from whom they were taken by such writ, executed the writ of replevin against the defendant. *Ilseley & al. vs. Stubbs*, 5 *Mass.* 280.

(d) 1. If the plaintiff becomes nonsuit, the defendant recovers damages to the amount of six per cent. on the penal sum of the bond, as well when the taking was on mesne process, as on execution. *Pike vs. Hutchins*, 1 *Mass.* 421; *Wood vs. Braynard*, 9 *Pick.* 322.

2. In debt on a replevin bond, the plaintiff is entitled to recover the value of the goods replevied, with the damages, and costs recovered, and interest on such damages and costs from the date of the judgment in replevin to the time of recovering judgment on the bond. *Arnold vs. Bailey & als.* 8 *Mass.* 145.

(e) This provision was made to save the defendant the expense and delay of going to a jury to secure his damages and to mulct the plaintiff for abusing a legal process. *Bruce vs. Learned*, 4 *Mass.* 617; *Mattoon vs. Pearce & als.* 12 *Mass.* 407. See *Cady vs. Eggleston & al.* 11 *Mass.* 282, transcribed in note h, to ante p. 392; and *Chandler & als. vs. Smith*, 14 *Mass.* 313; *Purple vs. Purple & al.* 5 *Pick.* 226.

CH. 80.

Attachment on mesne process continued in certain cases.

Damages recovered by officer to be to use of creditor.

Court may issue writ of withernam, in case.

[Ib. § 7.]

Court may vary form of writs in certain cases.

[Ib. § 8.]

and if on mesne process, until thirty days shall have expired, after final judgment thereon, in case judgment shall not have been given; but if final judgment on the mesne process shall have been given before the return, then for the space of twenty days only after the return, to the end, the creditor, at whose suit they were originally taken, may have a complete remedy, and the benefit of his attachment. And the monies recovered by way of damages, by any officer who has taken or attached any goods or chattels, at the suit of a creditor shall be considered and taken as recovered to the use of the creditor;—and when received, be paid over to him accordingly (f).

SECT. 5. *Be it further enacted*, That when the Sheriff or other officer, unto whom the writ of return and restitution shall be directed, shall not be able to find the beast or other property in his precinct, which shall, by the same precept, be directed to be returned and restored irrepleviable, and the same shall appear in writing by the return of the officer thereon, the Court from whence the same issued, may, upon motion, grant a withernam against the plaintiff in replevin, to compel a complete and specific performance of the judgment, which writ of withernam shall be in form prescribed by law.

SECT. 6. *Be it further enacted*, That when the writ of return and restoration or writ, in withernam, shall issue from any other Court of law, or for any other property than beasts, the Court from whence the same shall issue, shall so vary the form as to them shall appear expedient to carry the same into full force and effect, as the nature and circumstances of the case shall require. [Approved January 27, 1821.]

(f) In all cases where the damages are not prescribed by the statute, damages are to be assessed by the jury, according to the magnitude of the injury, without regard to the penalty of the bond. *Bruce vs. Learned*, 4 Mass. 617; *Mattoon vs. Pearce & al.* 12 Mass. 408.

2. Where issue is joined upon the plaintiff's property in the chattels, and the jury find the property of part in the plaintiff, and part not, each party is entitled to damages and costs. *Powell vs. Hindsdale*, 5 Mass. 343. See ch. 186, § 2, vol. 3, p. 5, on this point; and *Harding vs. Harris*, 2 Glf. 162.

8. A third person who is part owner of the property in dispute is a competent witness to disprove the plaintiff's title to the property. *Page vs. Weeks*, 13 Mass. 200.

Chapter 81.*

CH. 81.

AN ACT prescribing the mode of recovering Forfeitures of Personal Property liable thereto by law.

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SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That whenever any personal property shall be liable to forfeiture for any offence, any person or persons entitled thereto, or interested therein in whole or in part, may seize and shall safely keep the same till a final decree be had thereon, unless the owner or person from whom it was taken, claiming the same for himself, or some other person, shall give bond, with sufficient surety to the party seizing, to pay the appraised value thereof, when and if it shall be finally decreed forfeited; which value shall be appraised upon oath by three judicious and disinterested men, mutually chosen by the parties, or (in case of disagreement or refusal of the party seizing) appointed by a Justice of the Peace in the county where the property was seized; but upon the giving or tendering such bonds, the property shall be delivered to such owner or claimant, and if no claimant shall appear, the party seizing shall be held to cause an inventory and appraisement of the property seized, to be made by three disinterested persons under oath, who shall be appointed by a Justice of the Peace in the county where the property shall be seized; which appraised value shall be the rule by which to determine where the libel shall be commenced.

When personal property is seized as forfeited, [Feb. 22, 1794, § 1.]

it may be restored to the owner, he giving bonds, &c. for appraised value,

to be ascertained by men on oath, chosen by the parties or appointed by a Justice.

And if no person appear to claim the property, it must be also appraised on oath.

SECT. 2. *Be it further enacted,* That if the property seized exceed twenty dollars in value, the party seizing the same shall within twenty days after the seizure, but not afterwards, file a libel in the Clerk's office of the Circuit Court of Common Pleas in the county where the offence was committed, stating the cause of seizure, and praying for a decree of forfeiture; whereupon the Clerk shall make out a notification to all persons to appear at such Court, and show cause, if any they have, why such property should not be decreed forfeit for such cause of seizure; which notifications the libellant shall cause to be inserted in some newspaper printed in the same county, if there be one, otherwise in some newspaper printed in the next or nearest county, or in Portland,* fourteen days at least before the sitting of the Court at which the

If property seized exceed in value \$20, the party seizing to libel it within 20 days in C. C. Com. Pleas.

[Ib. § 2.]

Court to give notice.

Manner.

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CH. 81. libel is to be tried ; and upon entry of such libel, at the time when civil actions are to be entered in such Court, the Court shall have power to hear and determine the cause by a Jury, where there is a claimant, but without one, if, upon proclamation made, no claimant appears, and to decree the forfeiture and disposition of such property according to law, and may decree a sale and distribution of the proceeds, deducting charges where they think proper, and may also award costs against the claimants : and if such libel be not supported, or be discontinued, restitution of the property shall be decreed to the claimants, with costs. And if the Jury on the trial, where the libel is tried by a Jury, find the seizure groundless and without probable cause, they shall assess, and the Court shall decree reasonable damages for the claimant with costs. And either party aggrieved at the decree of such Court, may appeal therefrom to the Supreme Judicial Court next to be holden in the same county ; who shall have power, upon such appeal, finally to hear and determine the cause, and decree thereupon in manner aforesaid.

If property is claimed, Court may try the cause by Jury, and for good cause decree forfeiture.

If Jury find the seizure groundless, damages may be decreed to claimant.

Either party may appeal.

In case property seized be under \$20, the proceedings must be had before a Justice of Peace.

[Ib. § 3.]

Appeal allowed to C. C. C. Pleas.

Depositions may be used as in other cases.

Judgments for costs, &c. on complaint for affirmation.

SECT. 3. *Be it further enacted,* That when the property seized shall not exceed the value of twenty dollars, the libel shall be preferred to some Justice of the Peace in the same county where the offence was committed, within the time aforesaid ; who shall have power to hear, determine and decree thereupon as aforesaid, having first caused a like notification to be posted up, and which the libellant shall be held to do at some public place in the same county, seven days before the time of trial ; saving to either party aggrieved liberty of appeal from the decree of such Justice to the next Circuit Court of Common Pleas to be held in and for said county ; who shall have power finally to hear, determine and decree in the cause aforesaid ; and depositions taken for legal cause, and according to law, may be used on the trial, as well before said Justice as before said Courts. And if any such appeal is not entered and prosecuted, the Court to which the same was made, upon complaint, may affirm the decree appealed from, with additional damages and costs, or with additional costs only, as the case may require. [Approved March 5, 1821.]

Chapter 82.*

CH. 82.

AN ACT providing for the payment of Costs in Criminal Prosecutions.

[*371]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That in all cases wherein any costs in any criminal prosecution, commenced either before the Supreme Judicial Court or Circuit Court of Common Pleas in any county in this State, the Court before whom such prosecution so commenced (having cognizance of the offence) shall have power to allow and tax such costs for Justices, officers and their assistants, Jurors and witnesses, and for Court and other charges, upon such prosecution, and previous to its determination, not exceeding the fees that are or may be stated by law; whether the person accused be brought to trial or not, or whether he be convicted or acquitted upon trial (a): and all such costs so taxed, shall be paid out of the county treasury: *Provided,* That no Justice of the Peace shall hereafter have power to issue summonses for witnesses to appear at any Court, or before any Justice of the Peace, except on complaint brought before himself, to give evidence in behalf of the State upon any criminal suit, unless it be by the request of the Attorney General or County Attorney, which request shall be expressed in the summons: and when any Justice of the Peace shall issue any summons, at the request of the party prosecuted, it shall be so expressed in the summons, and the witness shall therein be required to appear and give evidence upon condition such person prosecuted pays him his legal fees, but not otherwise (b).

Courts authorized to allow and tax costs in cases before them, for Jurors, witnesses, officers, Justices, &c.

[Mass. Stat. Mar. 8, 1792, § 1.]

To be paid out of the county treasury.

Justices of the Peace not to summon witnesses for State in criminal cases, unless, &c.

[Ib. § 6; see ante, ch. 76, § 6, p. 437.]

SECT. 2. *Be it further enacted,* That the Clerk of each of said Courts shall attest and deliver to the county Treasurer copies of all bills of costs allowed by the said Courts, and certificates of all fines and forfeitures imposed and accruing

Clerks to deliver to county Treasurer attested copies of bills of costs allowed, and

(a) By ch. 235, vol. 3, p. 64, no costs can be taxed for the complainant as witness, aid, or otherwise; nor for the Justice, when respondent is bound over and no indictment is found against him; nor for witnesses in certain cases.

(b) Defendants in criminal cases not capital, must summon their own witnesses at their own expense. *Com. vs. Williams*, 13 Mass. 501.

CH. 82.

certificates of
fines, &c.
[Ib. § 1 & 2.]
And also to re-
turn to the
State treasury
certificate of
fines imposed
to use of State.
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Sheriffs, Coro-
ners and Con-
stables to pay
fines, penalties,
costs, &c. by
them collected,
to the county
Treasurer.

[Ib. § 3.]

Penalty for ne-
glect.

How recover-
ed and appro-
priated.

Penalty for
Sheriffs, &c.
permitting a
person senten-
ced to pay a
fine, &c. to go
at large before
payment of
such fine or
costs.

How recover-
ed and appro-
priated.

to the State (c), or to the county, either before the rising thereof or as soon after as may be : and shall also deliver him a separate certificate of all the bills of costs allowed by said Courts setting down therein the sum total only of each, for the purpose hereafter mentioned ; and the Clerks of said Courts shall also be held to return into the treasury* of the State a certificate of all fines and forfeitures imposed to the use of the State by their respective Courts.

SECT. 3. *Be it further enacted*, That all Sheriffs, Coroners and Constables who may hereafter receive any fines, forfeitures or bills of cost, in pursuance of the judgment or sentence of either of said Courts, as well where such fines or forfeitures accrue to the State, as where they accrue to the county, except debts and costs received upon executions in favour of the State, shall forthwith pay the same to the Treasurer of the county in which they shall be received ; and if any Sheriff or other officer, receiving such fine or forfeiture, or bills of costs, shall neglect to pay the same for the space of ten days after receipt thereof, he shall forfeit and pay double the amount of such fine or forfeiture, and bill of costs to such county Treasurer ; who is hereby empowered and directed to sue for the same forthwith, to be recovered with costs, by action of debt in the Circuit Court of Common Pleas, in the same county, one third of said penalty to the use of such county Treasurer, the other two thirds to the use of the State. And if any Sheriff or other officer, shall permit any person who may be sentenced to pay any fine, forfeiture, or bill of cost, and committed to the custody of such Sheriff or other officer or gaoler, till such sentence be performed, to go at large without payment, unless by order of law, and shall not pay such fine, forfeitures and costs, to the county Treasurer, within twenty days next after such escape, he shall be held to pay double the sum of such fine, forfeitures and costs ; and the Treasurer of the county shall have power to sue for and recover the same, in the same manner and to the same

(c) Clerks of court are authorized to receive all such fines, &c. at any time before issuing of a warrant of distress thereon, by ch. 464, § 1, vol. 3, p. 305. By the same chapter additional provisions for the collection of fines, &c. are enacted. See also, ch. 188, vol. 3, p. 7.

use as is herein before provided. And every Sheriff and other officer aforementioned, shall be held to produce to said Courts respectively, at every session thereof in their county, receipts in full from the county Treasurer, for all fines, forfeitures and costs imposed by said Courts respectively, received and paid, previous to the sitting of such Courts, or to assign the cause why they have not received, or not paid the same, in order that such Court, may order a prosecution against such as shall appear to be delinquent.

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Sheriff and other officers to produce to the Courts, &c.
County Treasurer's receipts for such sums, &c.

SECT. 4. *Be it further enacted*, That every Justice of the Peace, he, and he hereby is directed to pay all fines and forfeitures* by him received upon convictions and sentences before himself, as well those which accrue to the State as those which accrue to the county, to the Treasurer of the county whereof he is Justice of the Peace; and that he render his account and pay such fines on or before the first day of October next, and afterwards once in every six months. And if any Justice of the Peace shall neglect to account for, and pay in such fines and forfeitures to the Treasurer of the county, whereof he is Justice aforesaid, he shall forfeit and pay for every such neglect the sum of thirty dollars to such county Treasurer, to be by him recovered as aforesaid with costs, one half of such forfeiture to his own use, and the other half to the use of the State. And it shall be the duty of every county Treasurer, from time to time, to call upon the Justices of the Peace within his county, and to require them to account to him for and pay in such fines and forfeitures, and to prosecute such as shall be delinquent.

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Justices of Peace to pay fines and forfeitures received by him to the county treasurer and account semi-annually.
[Ib. § 4.]

Penalty for neglect how recovered and applied.

[See additional act.]

Duty of county treasurer to require Justices so to account, and prosecute for neglect.

SECT. 5. *Be it further enacted*, That every county Treasurer, shall, within two months after the rising of the Supreme Judicial Court, make out and transmit to the Treasurer of the State an account upon oath, therein charging the State with all bills of costs allowed and taxed by said Court, and by the Circuit Court of Common Pleas in and for each county respectively, for which the Clerk's certificates above mentioned shall be sufficient vouchers; and a commission of five per cent. on all monies received and paid, and giving credit for all fines, forfeitures and costs accruing to the State and by him received as aforesaid, and pay the balance

County treasurer to transmit to State treasurer an account, on oath, of bills of costs in Courts.

[Ib. § 5.]

Mode of adjusting and payment of balance of such accounts.

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[†See ch. 303,
vol. 3, p. 143;
also ch. 188, ib.
p. 7.]

Penalty for ne-
glect of this
duty by county
Treasurer.

[*374]
Mode of re-
covering pen-
alty.
Attorney Gen-
eral required
to prosecute
such delin-
quents.

County treas-
urer to render
a general ac-
count annually
to Governor &
Council, of
fines, bills of
costs, &c.

[Mass Stat.
Feb. 27, 1795,
§ 8.]

Substance and
form of such
account.

[Penalty for
neglect of
Treasurer es-
tablished. See
ch. 396, vol. 3,
p. 245.]

of such account, if in favour of the State, to the Treasurer thereof;† but if such balance be in favour of the county Treasurer, it shall be paid him or his order, out of any unappropriated monies in the Treasury, as soon as may be by the Treasurer of the State, said account having been first laid by him before the Governor and Council for their examination and allowance, and their warrant thereupon by him obtained for payment of the same. And any county Treasurer who shall neglect to make out and transmit his account as aforesaid, and to pay the balance if any be due, to the State, as aforesaid, within the time aforesaid, shall forfeit and pay the sum of one hundred dollars to the use of the State, to be recovered with* costs, by action of debt, in the Circuit Court of Common Pleas, in the county whereof he is Treasurer: and the Attorney General upon notice of such neglect, from the Treasurer of the State, which he is hereby required forthwith to give, shall be, and hereby is authorized and required to prosecute such action without delay, to final judgment and execution. And the said county Treasurer shall be also held notwithstanding the recovery of the penalty aforesaid, to account for and pay the balance of all such fines, forfeitures and costs, accruing to the State, into the Treasury thereof.

SECT. 6. *Be it further enacted*, That it shall be the duty of every county Treasurer, in addition to the accounts required by the fifth section of this act to be exhibited, to make out and exhibit on the third Wednesday of January annually, to the Governor and Council a general account of their proceedings, therein crediting the State for all monies by them respectively received, by warrants on the Treasury, or for fines, forfeitures and bills of cost, and from whom: and in the same account charging the State for all payments by them actually made before that time, and the balance due, if any, to credit to the State in a new account; and every county Treasurer shall at the same time, make out and transmit as aforesaid, an account of all sums due, and to whom, on any bills of cost allowed and taxed by the Supreme Judicial Court and Circuit Court of Common Pleas, and also an account of all fines and forfeitures, and bills of cost within their counties respectively, which belong to the State, and which may be

then remaining unpaid, and from whom the same shall be due ; and shall be further held to make out and exhibit such other statements, accounts and returns, as the Governor and Council shall judge to be necessary or expedient, for a just and accurate settlement of said Treasury transactions with the State under this act, and as the said Governor and Council shall from time to time require.

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SECT. 7. *Be it further enacted,* That all sums taxed or allowed, or which may hereafter be taxed or allowed, and all other charges which have arisen or may arise, in any criminal prosecution before the Supreme Judicial Court, or any Circuit* Court of Common Pleas, and which by law are chargeable to the State; shall be claimed and demanded by the person or persons who are or may be entitled to receive the same of the county Treasurer, within three years next after the same were or may be taxed or allowed, and not afterwards. And all persons not claiming or demanding such allowances, within the time above limited, shall be forever afterwards debarred therefrom. And it shall be the duty of every county Treasurer in his general account, required to be exhibited to the Governor and Council on the third Wednesday of January, to credit the State with all such sums allowed by either of said Courts remaining in the county treasury not claimed or demanded within the time abovementioned ; and also for all sums taxed in any bill of cost on a criminal prosecution, for the fees of the Attorney General when no other person is entitled thereto, and the amount of such sums shall be deducted from the county Treasurer's account against the State ; and every county Treasurer shall account with his county, for all sums received out of the treasury of the State, for Jury fees, and for gaoler's charges for the maintenance of prisoners.

Sums allowed by Courts to individuals, on criminal prosecutions, not to be paid, unless demanded within three years.

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Sums not demanded within that time, to be credited to the State by the county treasurer.

Sums taxed for fees of Attorney General, in cases, &c. to be credited State.

SECT. 8. *Be it further enacted,* That the charges of supporting prisoners, committed by due process of law, unable to support themselves, who (d) now are, or hereafter may be confined in any gaol, upon charge or conviction of crimes

How prisoners are to be supported, who are not able to support themselves—

(d) They are not paupers chargeable to towns, within the meaning of § 11 and 18, of the act relating to paupers, ch. 122, of vol. 2. *Adams vs. Wiscasset*, 5 Mass. 329.

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and mode of
proceeding in
such cases.

[Mass. Stat.
Feb. 27, 1795,
§ 1.]

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and offences committed against the said State, shall be, and hereby are made the proper charge thereof: *Provided however*, That in no case shall there be allowed by the State, more than at the rate of one dollar a week for any such prisoner, or more than the actual charges incurred for his support, being less than that sum: and the said charges shall be examined, allowed and paid as follows, to wit: The gaol keeper of each gaol in the State, shall render on oath, to the Court of Sessions of the county at each term thereof, an account of the charges incurred for the support of prisoners in the respective gaols, committed as aforesaid, stating therein the time when each prisoner was committed, for what offence, how long held, and when discharged (if discharged) and shall exhibit the warrants of commitment and discharge, and leave copies thereof with the said Court; and in the same* account, the said gaol keeper shall credit all monies and effects whatever, received or to be received of the prisoner, or of any persons on his account, and the said Court shall examine the said account, and inquire what part thereof the prisoner may be able to pay; and for such part as he shall be found unable to pay, the said Court shall make a reasonable allowance to the said gaol keeper, to be paid out of the county treasury.

Compensation
allowed by
State to coun-
ty treasurer.

[Ib. § 2.]

SECT. 9. *Be it further enacted*, That every county Treasurer shall charge to the State, not exceeding the rate aforesaid, the several sums he shall so pay out of the county treasury, with two and a half per cent. for his services, and shall include the same in the accounts which he is required to render to the Treasurer of the State in and by this act. And said payments shall make part of the debit of said accounts against the State, to be settled, allowed and discharged, as in this act is provided. [Approved March 19, 1821.]

See ch. 235, vol. 3, p. 64.

Additional Act, ch. 303, vol. 3, p. 143.

Chapter 83.

Ch. 83.

AN ACT authorizing Courts to liberate or dispose of poor Convicts in service.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That where any person shall have been convicted of any crime, either before a Justice of the Peace, or any Circuit Court of Common Pleas, or in the Supreme Judicial Court, and imprisoned three months for costs of prosecution only, the Circuit Court of Common Pleas, for the county where the person has been imprisoned, may order the Sheriff to dispose of such convict in service to any person whomsoever, for a term not exceeding two years, for payment of the costs for which he has been imprisoned as aforesaid; and if such disposal cannot be made, the same Court may order† the Sheriff to liberate such convict, on such terms, or on such conditions as they may think most beneficial to the State and county. And either of said Courts holden for the same county, may, at any term hereafter, on motion as aforesaid, order the Sheriff of their respective counties to liberate any convict in such* county in manner as aforesaid, after his having been imprisoned three months for costs as aforesaid. And when the costs aforesaid are not obtained by means of the liberation, they shall be paid as is provided by law for the payment of costs where there is no conviction. And the several Sheriffs are hereby required duly to execute the aforesaid orders, and to make return of their doings therein to the respective Courts.

SECT. 2. *Be it further enacted,* That the Justices of the Supreme Judicial Court, and the Justices of the several Circuit Courts of Common Pleas, within this State, be, and they hereby are authorized, at any term of their respective Courts, on motion made for that purpose, to order the Sheriff of said county, to liberate from prison any poor convict who shall have been committed to prison by the order of any Justice of the Peace, or of the said Circuit Court of Common Pleas, or of the Supreme Judicial Court within said county, when it shall be made to appear to said Circuit Court of Common Pleas, or the Supreme Judicial Court, that said convict

Persons imprisoned for three months for costs, after conviction before Sup. Jud. Court, C. C. Com. Pleas, or Justice of the Peace, may be disposed of in service;

[Mass. Stat. June 18, 1799.]

[†Power of Court transferred to the Sheriff. See addition† act.] and if such disposal cannot be made, convict may be liberated on such conditions as the Courts may direct.

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Costs how paid when not obtained of convict.

When prisoner has been confined 3 months for fine and costs, and is unable to pay, S. J. Court or C. C. C. Pleas may order him liberated on giving note to county treasurer for amount of costs.

[Mass. Stat. June 4, 1803, and March 7, 1806, § 1.]

CH. 84. has lain in prison for the term of three months, for fine and costs only, and that he stands committed for no other cause, and that he has not estate sufficient to pay said fine and costs: upon condition, however, that the Court shall order said convict to give his own note for the amount of said fine and cost, payable to the Treasurer of said county, to the use of said county. And upon condition that before the Justices of the Supreme Judicial Court and Circuit Courts of Common Pleas shall liberate such poor convict, they shall require of said convict a schedule in writing signed by him or her, stating the particulars of the property by him or her owned, together with an oath in writing by him or her signed, that the schedule contains a true account of all property of which he or she is the owner in possession, reversion or remainder, to his or her knowledge and belief. And that he or she has not sufficient wherewith to support him or herself in prison or to pay prison charges. And has not directly or indirectly sold, conveyed or intrusted to any person since the sentence passed by which said convict was committed to prison, any goods, effects or credits, nor any real estate, with intent to evade* the performance of the sentence against him or her. And if any such convict shall knowingly and wilfully make any false schedule or oath in relation to the matters aforesaid, or any of them, and be thereof convicted in the Supreme Judicial Court, he or she shall receive no benefit from the said liberation, but shall be liable to be again imprisoned till he or she performs the original sentence. [Approved March 20, 1821.]

[See additional act.]

In such case prisoner must give, under oath, a schedule of his property, &c.

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Penalty for giving false schedule.

Additional Act, ch. 190, Vol. 3, p. 8.

Chapter 84.

AN ACT regulating the Selecting, Empannelling and Service of Jurors.

Selectmen to keep a Jury box.
[Mass. Stat. Feb. 27, 1813, § 1.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled, That the Selectmen, in each town in this State, on or before the second Monday of September next, shall provide and at all times*

cause to be kept in their respective towns, one Jury box ; and shall, once at least in every three years afterwards prepare a list of such persons, under the age of seventy years, in their respective towns, as they shall judge best qualified to serve as Jurors, being persons of good moral character, and qualified as the Constitution directs, to vote in the choice of Representatives, excepting the Governor, Counsellors, Judges and Clerks of the Common Law Courts, Secretary and Treasurer of the State, Loan officers and Revenue officers, Judges and Registers of Probate, Registers of Deeds, settled Ministers of the Gospel, officers of any College, Preceptors of Incorporated Academies, Physicians and Surgeons regularly authorized, Cashiers of incorporated Banks, Sheriffs and their Deputies, Marshals and their Deputies, Counsellors and Attornies at Law, Justices of the Court of Sessions, Criers of the Judicial Courts, Constables and constant Ferymen (a) ; and having written their names upon tickets, they shall cause them to be placed in the Jury box, and shall then lay the whole of their doings before the town for a revision, who may confirm the same, or make such alterations therein as they may deem proper: and the said box shall be held and kept by the Town Clerk ; and the persons whose names shall be continued in said box, shall be liable to be drawn, and* serve on any Jury, at any Court for which they may be drawn, once in every three years, and not oftener (b).

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Once in three
years prepare
a list.

Persons ex-
empted from
serving as Ju-
rors.

Box to be kept
by town clerk.

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SECT. 2. *Be it further enacted*, That it shall be the duty of the several towns, to provide and have constantly kept in said box, ready to be drawn when required, a number of Jurors, not less than one, and not more than two, for every hundred persons, which said town may contain, computing by the last census which may have been taken, next before the preparing the box.

Number liable
to be drawn in
each town.

[Ib. § 2.]


SECT. 3. *Be it further enacted*, That if any person

Persons con-
victed, &c.

(a) See ch. 132, § 12, vol. 2.

(b) 1. See note to § 6.

2. After an indictment has been received and filed by the court, no objection of an irregularity in the empannelling of the grand jury can be received as a plea to such indictment. *Com. vs. Smith*, 9 Mass. 104.

CH. 84. whose name shall be in the box aforesaid, shall be convicted of any scandalous crime, or be guilty of any gross immorality,  their names to be taken from the box. his name shall be withdrawn from the box by the Selectmen.

Court of Sessions to divide counties into Jury districts.

[Mass. Stat. Mar. 12, 1808, § 3.]

Rule to be observed by Clerks in sending venires.

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Grand Jurors at C. C. Com. Pleas to serve the year.

Sheriff to distribute the venires.

SECT. 4. *Be it further enacted,* That the Courts of Sessions in the several counties in this State, within one year next after every new census, and as much oftener as any considerable change in the state of population shall render useful and necessary, shall divide their respective counties into at least four Jury districts, and more if it shall be found in practice convenient, not exceeding twelve, each to contain so many adjoining towns as shall make the number of inhabitants in each division as nearly equal, according to the last census for the time being, as may be, without dividing a town ; and such Jury districts shall be numbered and distinguished numerically ; and the said Courts of Sessions shall cause copies of such divisions to be delivered to the Clerks of the respective Courts at which the course of trials is or may be by Juries, who shall issue their *venire facias*, in due form, directed to the respective Constables of as many towns in one such Jury district, and for as many Jurors as shall be, as near as may be in proportion to the number of Jurors sent for in the other districts, to serve at the same Court, always collecting the grand and traverse Jurors so far as shall be practical and convenient as uniformly from all parts of the county, as the situation of towns, the number of their inhabitants, and a practical rotation and equalization of the service of Jurors will permit ; never taking more than two grand and two traverse Jurors from the same town, to serve at the same Court, unless from necessity, some extraordinary occasion,* or to equalize their services on the principles aforesaid.

SECT. 5. *Be it further enacted,* That the Grand Jurors who shall be returned to serve at the Circuit Court of Common Pleas, shall serve at every term of said Court, which shall be held throughout the year. And venires for such a Jury, shall be issued forty days at least, before the second Monday of September annually. And the Sheriff of each county, so soon as he shall receive the venires for Jurors, from the Clerk of either Court, shall without any

delay, forward the same to the Constables of the towns to whom they shall be directed ; and the Constables of their respective towns, on the reception thereof, shall, in the usual form, notify the freeholders and other inhabitants, in their towns, qualified to vote in the election of Representatives, and particularly the Selectmen and Town Clerk, to assemble and be present at the drafts and selection of the Jurors called for ; which meeting shall be held at least, six days, and not more (c) than twenty days, before the sitting of the Court to which the *venire* shall be returnable.

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Constables' duty, &c.

[Ib. § 4.]

SECT. 6. *Be it further enacted*, That when any town shall be duly assembled, in pursuance of a *venire facias*, for the purpose aforesaid, the Town Clerk, or in his absence, one of the Selectmen, shall carry into the meeting the box containing the names of those persons who have been selected to serve as Jurymen, at the Court from which the *venire* issued ; which box shall be unlocked in the meeting, and the tickets mixed by the major part of the Selectmen, who are to be present ; and one of the Selectmen shall draw out as many tickets as there shall be Jurors required by *venire*. The persons whose names shall be thus drawn, shall be returned to serve as Jurors, unless from sickness, absence beyond sea, without the limits, or in different parts of the State, they shall be considered by the town as unable to attend the Court for which they had been drafted ; or had served on a (d) Jury within three years from that day. In either of these cases, or in case of a Coroner's being drawn at a time when the duties of a Sheriff shall be devolved on him by reason of a vacancy in that office, the persons' names being returned into the box, others shall be drawn in their stead ; but* any person being thus excused, or who shall be return-


Mode of drawing Jurors.

[Mass. Stat. Mar. 12, 1808, § 5.]

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(c) It appeared upon the face of the *venire* and officer's return, that a juror was drawn more than twenty days before the sitting of the court, but the fact did not come to the knowledge of a party, until after a verdict against him. *Held* that this was no cause for setting aside the verdict upon motion, and that it could not sustain a writ of error. *Amherst vs. Hadley*, 1 Pick. 38.

(d) One having served as a juror in the courts of the U. States within three years, is not liable to be returned as a juror in the courts of the State. *Case of Swan*, 16 Mass. 220. See *Brown, ex parte*, 8 Pick. 504. Also additional act.

CH. 84.  ed, and shall not appear at Court, or appearing, shall be there excused, shall not be considered as serving, or be excused on another draft, should it happen within the term of three years, the minute on his ticket notwithstanding.

Constables to notify Jurors who have been drawn.

[Ib. § 6.]

SECT. 7. *Be it further enacted,* That the Selectmen who shall draw from the box the ticket of any person to serve as a Juror, and who shall not be excused by the town, for either of the causes aforesaid, shall endorse thereon the date of the draft, and then return the same into the box ; and it shall be the duty of the Constable to notify the persons thus designated to serve as Jurors, four days at least (e), before the sitting of the Court, on which they are to attend, either by reading to them the venire, with the minutes of their having been drafted as aforesaid, thereon ; or by leaving at their usual abode, a written notification of their having been so drawn, and also of the time and place of the sitting of the Court, and when they are to attend. And he shall make a seasonable return of the venire to the Court to which it is returnable, with his doings thereon. And whenever there shall be a renewal, or an exchange of any of the tickets in the box, for others, of the same persons, the Selectmen shall transfer from the back of the old tickets to the new ones, the minutes of such drafts as has been made within the three preceding years.

In case of deficiency of grand or traverse Jurors, Court may issue venires returnable forthwith.

[Ib. § 7.]

Sheriff or Coroner may return Jurors de

SECT. 8. *Be it further enacted,* That when by a deficiency of either of the grand, or traverse Jurors of any Court, it cannot conveniently proceed in its business, it may cause writs of venire facias for the drawing and returning so many Jurors as shall be deemed necessary, to be forthwith issued, and directed to the Constables of such towns in the county as the Court, under the existing circumstances, shall judge most proper ; conforming as far as the business of the Court will permit, to the principles by which, under this act, Jurors are to be selected, and their services equalized : and the Jurors so drawn, shall be notified by the Constables to attend on the Court immediately. And when from challenges or otherwise, there shall not be a Jury to determine

(e) *Com. vs. Swan*, 1 Pick. 196.

any civil or criminal cause, which may be called on for trial, the Sheriff or his deputy, or in case of an interest or relationship* in him, to a party in the suit, a Coroner, or such other disinterested person as the Court shall appoint, shall, by order of the Court, return Jurymen *de talibus circumstantibus* (*f*), sufficient to complete the panel: *Provided*, No person shall be considered as competent to be returned, whose name shall not, to the satisfaction of the Court, appear to be contained in the box aforesaid, unless the parties consent, and also provided that there shall be seven at least on the panel, of the Jurors returned by the venire.

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talibus circumstantibus.
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Proviso.

SECT. 9. *Be it further enacted*, That the Justices of the respective Courts aforesaid, shall on motion from either party, in a suit, put any Juror upon oath, whether he is any way related to either party, or hath formed or given any opinion, or is sensible of any particular interest or prejudice in the cause; and if thereupon, it shall appear to the Court, that such Juror does not stand indifferent in the cause, another Juror shall be called or returned, and be placed for the trial of that cause in his stead (*g*).

Jurors may be examined on oath as to their interest, &c.

[Ib. § 9.]

SECT. 10. *Be it further enacted*, That from the return on the venires, the Clerk of each Court shall prepare, or have prepared, at the opening of every Court, separate alphabetical lists of the names of the persons who shall be returned as grand or traverse Jurors, respectively. And each Court, in empannelling the grand Jury, shall cause the two persons who shall stand first on the grand Jury lists to be called and sworn, and after them the others, in succession, as they shall be named in said list, and in such divisions as has been usual, or as by the Court may be deemed proper.

Clerk of court to prepare alphabetical list of Jurors.

[Ib. § 10.]

Mode of empannelling grand Jury.

SECT. 11. *Be it further enacted*, That the respective

(*f*) It is irregular for a talisman to set in any cause, except the one for which he is returned; but the objection must be made before verdict. *Amherst vs. Hadley*, 1 Pick. 38.

(*g*) 1. The court will not set aside a grand juror, because he has been the prosecutor of a person accused of a capital crime, whose case may probably be brought before the grand jury. *Tucker's case*, 8 Mass. 286.

2. The party must avail himself of this provision when the jury are being empannelled. *Jeffries & al. vs. Randall*, 14 Mass. 206. See also, *Amherst vs. Hadley*, 1 Pick. 38.

CH. 84. Courts in empannelling the traverse Jurors, shall cause the names of the two first persons which shall stand on the list of Jurors of trials respectively, to be called, who shall be first sworn, and then the others in succession, as they shall be named in said list, and in such divisions as has been usual, or as the Court may deem proper. And the first twelve persons, thus empannelled, shall be the Jury; and when there shall have been venires, and returns for two Juries, shall be called the first Jury; and the next on said list being called and sworn, as aforesaid, to the number of twelve shall form the second Jury: *Provided*, And in case of the Court's* excusing for cause, any person of either of said Juries, and there being any supernumeraries, the vacancy shall be supplied, and the pannels be filled and completed, on the above mentioned principles, in the same manner as if the person excused, had not been named in the Jury list; and provided, also, in case of supernumeraries, on request, the Court may excuse individuals of either panel, who may not have sufficient reasons to exempt them from serving, so far as their places can be supplied by the supernumeraries, and by their consent.

Mode of empannelling traverse Jury.

[Ib. § 11.]

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SECT. 12. *Be it further enacted*, That the oaths which shall be administered to the grand and traverse Jury, respectively, when they shall be empannelled, shall be in the forms following, namely:

[Grand Jurors' oath.]

Grand Jurors' oath.

[Ib. § 14.]

You as Grand Jurors of this inquest for the body of this county of S, solemnly swear that you will diligently inquire, and true presentment make of all such matters and things, as shall be given you in charge; the State's counsel, your fellows', and your own, you shall keep secret; you shall present no man for envy, hatred or malice; neither shall you leave any man unrepresented, for love, fear, favour, affection, or hope of reward; but you shall present things truly as they come to your knowledge, according to the best of your understanding. So help you God.

[The other Grand Jurors' oath.]

The same oath which your fellows have taken, on their part, you and each of you, on your behalf, shall well and truly observe and keep. So help you God.

[The form of the traverse Jurors' oath in civil causes.]

Traverse Jurors' oath.

You, and each of you swear, that in all causes betwixt party and party that shall be committed to you, you will give a true verdict therein, according to the law and the evidence given you. So help you God.

[Form of the oath in criminal causes, not capital.]

Oath in criminal causes.

You swear, that you will well and truly try the issue between the State and the defendant or defendants, (as the case may be) according to your evidence. So help you God.

[Form of the oath in capital cases.]

You swear, that you will well and truly try, and true deliverance make, between the State, and the prisoner at the bar,* whom you shall have in charge, according to your evidence. So help you God.

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Provided, That any person conscientiously scrupulous of taking an oath, shall instead thereof be allowed to make affirmation, substituting the word, "affirm," instead of the word "swear," and also the words, "this you do under the pains and penalties of perjury," instead of the words, "So help you God."

Affirmation in cases of scrupulosity.

SECT. 13. *Be it further enacted*, That it shall be the duty of the Grand Jury, who shall be thus sworn, empannelled and instructed by the charge from the Court, so soon as they shall retire for the purpose of discharging the duties of their office, first to elect by ballot their foreman, and to notify the Court, by the officer who shall be appointed to attend on them, of the person who shall have been thus elected, and who shall be thereupon foreman of the Jury for the then existing term, and as such be recorded by the clerk accordingly. But in case of the absence of such foreman, by sickness, or any other cause, it shall become necessary during the same session of the Jury, to appoint another foreman, they shall proceed in a similar manner to elect, and to announce to the Court the choice of another foreman in his stead. And the foreman of each grand Jury, in the presence of the Attorney General or County Attorney, shall have power to swear any witness to testify before such grand Jury, and it shall be his duty to return to the Court which empannelled them, a list of all witnesses so sworn, before said grand Jury be discharged from their attendance upon the said Court; which list shall be filed and entered of record by the Clerk thereof. And the traverse Jurors being thus empannelled, shall respectively, either retire and choose by ballot their respective foreman, or shall make such a choice on their retiring with the first cause with which they shall be charged, as may best accommodate the arrangements and business of the Court, of which choice, the Court shall be notified on the Jury's return.

Grand Jury to elect foreman by ballot.

[Ib. § 10.]

Foreman may, in presence of Attorney for State swear witnesses.

Traverse Jurors to choose foreman by ballot.

-SECT. 14. *Be it further enacted*, That if at any time, from the existing state of the country, the nature or quantum

Provisional Jurors may be

CH. 84. of the business pending, or from any other cause, the Courts respectively, shall be of opinion that it will be a hardship on* one set of traverse Jurors to serve the whole of the term, and that it would best meet the interest of the public and of individuals, to have a second set of Jurors to serve a part of the term, it shall be in the discretion of the Court to direct their Clerk, when they shall issue their venires to the Constables, in manner before directed, for the usual number of Jurors, to require in the same venire, that a second draft of an additional number, equal to the first number, shall be made, which shall be called provisional Jurors, and shall form the second set, so far as they shall be needed, and especially sent for by the Court. And the Constables shall also notify these Jurors four days before the sitting of the Court, of their being drawn as provisional Jurymen, in the same manner as is provided for the notification of the first set of Jurors. And such provisional Jurors shall hold themselves in readiness, and if called for by the Court, shall attend and serve, at any time in the course of that term. And in all cases, when provisional Jurors shall be drawn as aforesaid, it shall be in the discretion of the Court, at any time during the session, to excuse, on request, from further attendance, any individual of the first set of Jurors, on the condition of his giving seasonable and personal notice to such a provisional Juror or Jurors, for his or their immediate attendance, as shall be designated and called for, by the discretion of the Court.

required to be drawn.

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[Ib. § 12.]

Such Jurors to be notified and ready when called for.

Court may excuse Jurors of first set.

Powers and duties of grand and traverse Jurors.

[Ib. § 15.]

SECT. 15. *Be it further enacted,* That it shall be the business of the grand Juries to present all crimes, offences, and breaches of the law, cognizable by the respective Courts at which they shall attend; and of the traverse Juries, respectively, to try, according to the established forms and principles of law, all causes which shall be committed to them, and to decide at their discretion by a general verdict, both the fact and the law, involved in the issue; or to find a special verdict, or a general verdict, subject to the opinion of the Court, on a case or point stated and reserved by agreement of the parties, or their counsel, under the direction of the Court, as making a part of the record, to be entered as such; and in case such Jurors, after a due and thorough

deliberation on any civil cause, with which they may be charged, shall return into Court without having been able to* agree on a verdict, it shall be in the discretion of the Court explaining to them its understanding of questions of law, if any should be proposed, and re-stating what any witness had testified, should that be requested by the Jury, to send them out again for further deliberation ; and if the Jury should return a second time without being able to agree on a verdict, they shall not be liable to be sent out a third time, unless they shall state some legal difficulties for explanation, which had not been previously attended to by the Court. And if any person obtaining a verdict in his favour in any Court in this State, shall, during the session of the said Court, in which such verdict shall be obtained, give to any of the Jurors in said cause, knowing him or them to be such, any victuals, drink or entertainment (*h*), or other article by way of treat or gratuity, whether before or after such verdict, on due proof thereof, it shall be a sufficient reason, at the discretion of the Court, to set aside the verdict, at the election of the adverse party, and award a new trial of the cause.

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Party prevailing not to treat the Jury.

SECT. 16. *Be it further enacted*, That in all cases relating to real estates, either party may have a Jury to view the place in question, if the Court shall be of opinion, that such view is necessary to a just decision : *Provided*, The party moving therefor shall advance such a reasonable sum to the Jury, as the Court shall order to be taxed against the adverse party in the event of a decision of the cause against him, on its merits, or through the default of the adverse party.

In real actions a view may be had.

Proviso as to costs.

[Ib. § 8.]

SECT. 17. *Be it further enacted*, That the Justices of

(*h*) 1. Where the prevailing party, previous to the trial, but during the same term of the court, conveyed one of the jurors several miles in his own sleigh, to the house of a friend, where he was hospitably entertained for the night; the verdict for this reason, was set aside. *Cottle vs. Cottle*, 6 Glf. 140.

2. A verdict will not be set aside because the jury at their own expense, being fatigued and exhausted with the length of the trial, were furnished with some refreshments. *Purrington vs. Humphrey*, 6 Glf. 379.

3. But if ardent spirits constitute a part of such refreshments, and appear to have operated upon any juror so far as to impair his reasoning powers, inflame his passions, or leave an improper influence upon his opinions, the verdict would probably be set aside. *Ib.*

CH. 84. either of the Courts aforesaid shall have power to order the writ of venire facias, which may be issued either for the grand or traverse Jurors, to be returned on such day of the term, as they may judge will best serve the purposes of justice, and facilitate the business of said Court.

Venires for Jurors may be returnable on any day the Court may direct.

Town meetings for Jurors, how to be notified.

[S. § 18.]

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Compensation of Jurors.

[Ib. § 16.]

[†Increased by ch. 363, vol. 8, p. 218.]

Penalty on any officers for neglect of duty, and appropriation.

[Ib. § 17.]

SECT. 18. *Be it further enacted,* That the manner in which Constables, upon the receipt of venires for Jurors, shall notify the qualified inhabitants of their respective towns to assemble, and to be present at their drafts as aforesaid, shall, unless otherwise ordered by said towns respectively, be the same as has been or shall be established therein for notifying* and warning their annual town meetings. But if any town shall, at a legal town meeting, have ordered that the notifications shall be by the Constables, giving notice to the Selectmen or the major part of them, and the town Clerk, or by any other mode, such notification shall be sufficient.

SECT. 19. *Be it further enacted,* That the grand and traverse Jurors who shall attend at the Supreme Judicial Court, and Circuit Court of Common Pleas, shall each be allowed one dollar and twenty-five cents† a day for their attendance, and six cents a mile for their travel out and home; to be paid out of the county treasuries respectively.

SECT. 20. *Be it further enacted,* That the Selectmen, Town, Constable, Clerk of the town, Clerk of the Court, Sheriff or Juror, who having no justifiable cause therefor, shall neglect to discharge the duties incumbent on them, him or it, respectively, by this act, shall be subjected to the respective fines and amercements named to be assessed, ordered and imposed by the Court, in reference to whose Jurors such neglect or failures may have taken place; namely, a fine not exceeding twenty dollars, at the discretion of the Court, on any Selectmen or town Clerk, who shall so neglect to perform his or their duty herein prescribed, as by means whereof the Jurors called for from his or their town shall not be returned; a fine not exceeding twenty dollars, at the discretion of the Court, on any Constable, who shall so neglect to perform the duties devolved on him by this act, by means whereof there shall be a failure of the Jurors called from his town as aforesaid; a fine or amercement not exceeding one

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hundred dollars, at the discretion of the Court, on any town which shall so neglect the duties herein enjoined on it, as thereby to occasion a failure of the Jurors called for from such a town; a fine at the discretion of the Court, not exceeding fifty dollars, on their Clerk, or the Sheriff, who shall so neglect the duties enjoined on them, respectively, by this act, as to prevent a compliance with any of its provisions; a fine on any Juror drawn, notified and returned, in the manner as above described, who shall unnecessarily fail in his attendance, and not being an inhabitant of Portland, not exceeding twenty dollars, and if an inhabitant of that town, not exceeding forty dollars, to be divided equally* among the Jurors who shall attend and serve; and a fine not exceeding eighty dollars, on any town Clerk or Selectman, who shall be guilty of any fraud, either in practising on the Jury box previously to a draft, or in the drawing a Juror, or in returning the name of any Juror into the box, which had been fairly drawn out, and drawing or substituting some other one in his stead, or in any other way whatsoever; and all such fines which the Selectmen, Constable, town Clerk, Sheriff or Clerk of a Court, shall incur by virtue of this act, for any neglect, shall be to the use of the county in which the offender dwelt at the time of the neglect, to be recovered by indictment, information, or an action brought by the Treasurer of the county, before any Court having jurisdiction of the offence: *Provided*, The action shall be brought within twelve months after the offence shall have been committed; such fines or amercements as shall be ordered or imposed on towns for any neglect of their duties as before specified, shall be to the use of the county in which the offending town may be; and all fines and forfeitures for any of the frauds, by Town Clerks or Selectmen as above mentioned, shall be recovered by action of debt, in any Court having jurisdiction thereof; one moiety thereof to be and enure to the State, the other moiety to him or them who shall prosecute and recover the same. [Approved February 14, 1821.]

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Limitation of
actions for
penalty.

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Chapter 85.

AN ACT prescribing the mode of taking Depositions.

In what cases
and circum-
stances depo-
sitions may be
taken.

[Mass. Stat.
Feb. 3, 1798,
§ 1.]

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On application
to a Justice,
notice to be
given to ad-
verse party if
in this State.
[Ib. § 2.]

Form of no-
tice.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That when any civil cause shall be pending in any Court, or before any Justice of the Peace in this State, and the writ, original summons, or complaint therein shall have been served on the defendant, or be pending before Referees or Arbitrators, and either party in the cause shall think it necessary to have the testimony therein of any person who shall live more than thirty miles from the place of trial by a Court, Jury, Referees or Arbitrators, or shall be bound on a voyage to sea before, or be* about to go out of the State, and not to return in time for the trial; or shall be so sick, infirm or aged, as not to be able to travel and attend at the trial; then the deposition of such person may be taken before any Justice of the Peace not being of counsel or attorney to either party, or interested in the event of the cause: *Provided*, Notice be given, and proceedings be had as hereinafter directed.

SECT. 2. *Be it further enacted,* That when either party in the cause shall apply (a) to a Justice of the Peace to take such deposition, he shall give notice to the adverse party, if in this State, in substance as follows, to wit:

(1. s.) — ss. To — of —, in the county of — [addition.] Greeting.

Whereas A B of — in the county of — [addition] has requested me to take the deposition of — (b) of — in the county of —, [addition] to be used in an action of — pending between you and the said A B and the house of — in —, and the — day of — in the year of our Lord — at — of the clock in the — noon are appointed the time and place for the said deponent to testify what he knows relating to the said action: You are hereby notified that you may then and there be present, and put such interrogatories (c) as you may think fit.—Given under my hand and seal at —, on the — day of — in the year of our Lord —.

— Justice of the Peace.

(a) *Haskell vs. Haven & al.* 3 Pick. 407.

(b) A deposition cannot be used unless the name of the deponent is contained in the notification of the magistrate to the opposite party. *Minot vs. Bridgewater*, 15 Mass. 492.

(c) A leading interrogatory, in a deposition taken when both parties are present, must be objected to at the time it is put to the witness, if at all. *Woodman vs. Coolbroth*, 7 Glf. 181.

Provided nevertheless, That the notification to the adverse party may be issued by the Justice before whom the deposition is to be taken, or by any other Justice of the Peace within the State, *mutatis mutandis*, at the election of the party, at whose request such deposition is to be taken ; and *Provided further*, That notice may be given verbally, by the Justice taking said deposition, or notice may be dispensed with, if the adverse party or his attorney shall, in writing, waive the same. And when the adverse party is not present at the taking of such deposition, the Justice taking the same shall certify (*d*) that he was duly notified. And the service of this notification on the said adverse party, or his attorney, by leaving an attested copy thereof at his last and usual place of abode, allowing time for his attendance after being notified, not less than at the rate of one day, Lord's days* exclusive, for every twenty miles travel ; and such service being proved by the affidavit of a disinterested witness, or by the return on said notification of the Sheriff or his deputy of the county, or of the Constable of the town where the said adverse party or his attorney shall live, shall be deemed sufficient notice. But no person for the purposes of this act, shall be considered as the attorney of another, until such attorney shall have endorsed the writ ; or endorsed his name on the summons to be left with the defendant in the cause ; or until he shall have appeared for his principal in the cause, before the Justice of the Peace, Referees or Arbitrators, or in the Court where the said action shall be pending, or shall have given notice in writing, stating he is attorney in the cause, to the other party or his attorney. And where there are several plaintiffs or defendants in any action, such notice to one of them, or the notice aforesaid to be given by the said Justice, given to one of them, shall be deemed sufficient.

SECT. 3. *Be it further enacted*, That every person deposing as aforesaid, shall first be cautioned and sworn or affirmed to testify the truth, the whole truth and nothing but the truth, and being afterwards carefully examined shall sub-

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Notice may be issued by the Justice taking the deposition, or any other Justice.

Justice may give verbal notice, or it may be waived in writing.

Justice must certify notice.

Manner of giving notice.

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Who to be considered as an attorney to be notified.

Where there are several plaintiffs or defendants, notice to one good.

Deponent to be cautioned and sworn before being examined. [Ib. § 3.]

(*d*) 1. The certificate of the magistrate is not conclusive. *Minot vs. Bridgewater*, 15 Mass. 492. See *Barnes vs. Ball & al.* 1 Mass. 75.

2. *Welles vs. Fish & al.* 3 Pick. 74.

CH. 85. scribe the testimony by him or her given, after the same shall be reduced to writing, which shall be done only by the Justice taking the deposition, or by the deponent, or some disinterested person in the presence of the said Justice; and the deposition so taken shall be retained by such Justice until he deliver the same, together with a certificate of the reasons for taking such deposition, and of notice, if any, with his own hand to the Court, Justice, Referees or Arbitrators, for which it may have been taken, or shall, together with such certificate as aforesaid, be sealed up by him, and directed to such Court, Justice, Referees or Arbitrators, and remain under his seal until opened in Court, (e) or by such Justice, Referees or Arbitrators: which certificate shall be in substance as follows, to wit:

Deposition to be written by Justice, deponent or a disinterested person.

Justice to hand it into Court, &c.

or make a formal caption, and seal it up.

[*391] — ss. — On the — day of —, in the year of our Lord —, the aforesaid deponent was examined and cautioned, and sworn (or affirmed) agreeably to law, to the deposition aforesaid by him subscribed, taken at the request of —, and to be used in action of — now pending* between him and — before [here name the Court, Justice, Referees or Arbitrators]; and the adverse party was, or was not present (as the case may be) the said deponent living more than thirty miles from the place of trial, or being about to go out of the State and not to return in time for the trial, or being bound on a voyage to sea, or being so sick, or being so infirm, or being so aged as to be unable to travel and attend at the trial, is the cause of taking this deposition. — Justice of the Peace.

Form of summons to deponent. [Ib. § 4.]

SECT. 4. *Be it further enacted*, That such Justice when requested by the party applying as aforesaid, shall issue his summons to the deponent in substance as follows, to wit:

(L. s.) — ss. To — of — in the county of — [addition] Greeting.

Whereas A B of — in the county of — [addition] has requested me to take your deposition, to be used in an action now pending between him and —, and the house of — in — and the — day of — in the year of our Lord — at — of the clock in the — noon, are appointed the time and place for taking the same deposition: You are hereby required in the name of the State of Maine, then and there to appear to testify what you know relating to the said action. Hereof fail not. Given under my hand and seal at — the — day of — in the year of our Lord —. — Justice of the Peace.

Manner of serving such summons, to be effectual.

Which summons when served, and the service thereof proved as before prescribed, in the case of the said notification, shall be deemed good and sufficient; and if any deponent so summoned shall neglect to appear at the time and

(e) A deposition, opened by mistake out of court, may be received and filed, on affidavit of the fact, and that it had not undergone any alteration. *Law vs. Law*, 4 Glf. 167.

place appointed in the summons, and having tendered to him or her thirty-four cents for his or her time, and four cents a mile for his or her travel, computing from the deponent's said place of abode to the place of caption, and back, such deponent shall be subject to like actions forfeitures and attachment as are provided by law where witnesses are summoned to Court and do not appear (*f*).

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Penalty for non attendance of such witness.

SECT. 5. *Be it further enacted*, That if on the trial of any cause, either party shall make it appear probable to the Court, that it will not be in his power to produce the witnesses, there testifying on the appeal or review of the cause, and shall move that their testimony be taken down in writing, it* shall be done by the Clerk of the said Court, or by such Justice of the Peace as the Court shall appoint; and if any appeal or review be had, such testimony may be used, if it shall appear to the satisfaction of the Court that the witnesses are then living more than thirty miles from the place of trial, or dead, or gone out of the State, or on a voyage to sea, or so sick, infirm or aged as then to be unable to travel and attend at the trial and not otherwise. And in every case (as oral testimony examined and cross-examined in open Court is to be preferred to depositions, when it can be reasonably had) where the deposition of a witness shall have been taken, it shall not be used in the cause at the trial, by the Court, Justice, Referees or Arbitrators, if the adverse party shall then make it appear that the reasons for taking the said deposition no longer exist; but that the witness is within the said distance, and able personally to appear.

In certain cases testimony may be taken in open Court, to be used on appeal, &c.
[Ib. § 5.]

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But not to be used if the witnesses can be produced.

SECT. 6. *Be it further enacted*, That all depositions taken out of this State before any Justice of the Peace, Public Notary or other person legally empowered to take depositions in the State or County where such depositions shall be taken and certified, may be admitted as evidence in any civil action, or rejected at the discretion of the Court: *Provided nevertheless*, That if the adverse party or his attorney shall live within twenty miles of the place of caption, no deposition shall be admitted, unless it shall appear by the cap-

Depositions taken out of the State may be admitted or rejected at the discretion of the Court.
[Ib. § 6.]

Provided adverse party be notified, if within 20 miles.

(*f*) See further provisions on this subject, in act passed March 4, 1833, ch. 85.

CH. 85. tion or affidavit, that such adverse party or his attorney was notified of the time and place of caption.

Judicial courts may grant dedimus for taking depositions, on such terms as they may deem proper.
[Ib. § 7.]

SECT. 7. *Be it further enacted*, That the Justices of the Supreme Judicial Court and of the Circuit Court of Common Pleas, may grant a dedimus potestatem (g) to have depositions taken, either within or without the State, in any action, suit or controversy pending in said Courts respectively, on such terms and conditions as they from time to time shall prescribe (h).

Depositions in perpetuum, how taken and certified.

[Ib. § 8.]
[See ch. 211, vol. 3, p. 41; also ch. 243, vol. 3, p. 78.]

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SECT. 8. *Be it further enacted*, That where any deposition shall be taken in perpetual remembrance of a thing, it shall be done by two Justices of the Peace, quorum unus (i), and they shall cause such as they know to be interested, to be duly notified of the time and place of the caption, if within twenty miles thereof, or in this State; and if without that distance,* their attorney, if any they have; and the deposition being reduced to writing by one of the Justices or by the deponent in their presence and subscribed, the said Justices shall administer the oath and certify the caption and the names of all persons, whom they notified of the taking thereof, in substance as follows, to wit:

STATE OF MAINE.

Form of the caption.

— ss. Town of — this — day of — in the year of our Lord — personally appeared before us, the subscribers, two Justices of the Peace in and for the county of — quorum unus, the aforesaid deponent, and after being carefully examined, and duly cautioned to testify the whole truth and nothing but the truth, made oath, or affirmed, that the foregoing deposition by him subscribed is true. Taken at the request of — to be preserved in perpetual remembrance

(g) Where a commission issues to any judge or magistrate of another State, to take depositions in a cause in the S. J. Court of this State, the official certificate of the judge or magistrate is received as *prima facie* evidence of his authority. *Clement vs. Durgin*, 5 Glf. 9.

(h) Where a commission issues to “any” magistrate (none being named) in another State, to take depositions of witnesses, none of whom are named, and the adverse party desires that his agent (naming him) living at the place of caption, may have notice to attend the taking, it is reasonable that such notice should be given. *Bryant vs. Com. Ins. Co.* 9 Pick. 485. See ch. 48, vol. 3, p. 78.

(i) Where a statute confers certain powers upon, or requires certain duties to be performed by, any two justices *quorum unus*, it is only necessary that one should be of the *quorum*. *Gilbert vs. Sweetair*, 4 Glf. 483.

of the thing. And we duly notified A B, C D, E F, being all the persons living within twenty miles of this place of caption, or in this State, we knew to be interested in the property to which the said deposition relates; and ——— attended [if any person so notified did attend] or ——— we not knowing any persons, living within twenty miles of said place of caption, or within the State, interested in the property whereto the aforesaid deposition relates, did not notify any persons to attend.

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And the same deposition and caption shall within ninety (j) days be recorded in the office of the Register of Deeds in the county where the land lies, if the deposition respected real estates; and if the same respected personal estates, then in the said office of the county where the person lives for whose use such deposition was taken; and such certificate shall be certified on the deposition, and the same deposition so certified, or a copy of the said record, may in the case of the death of such deponent, absence out of the State, or inability to attend the Court as aforesaid, be used as evidence in any cause to which it may relate.

Deposition to be recorded within 90 days in county where land lies, or where person lives for whom taken if it relates only to *personal estate*. Certified copy of such deposition to be legal proof, if deponent cannot attend.

SECT. 9. *Be it further enacted*, That every person who shall be conscientiously scrupulous of taking an oath and who on any lawful occasion shall be required to take an oath as a witness in any cause, shall instead of the usual form be permitted to affirm in these words, to wit: "I, A. B. do affirm under* the pains and penalties of perjury," which affirmation shall be deemed of the same force and effect, as his or her oath would have been on the same occasion, taken in the usual form. And if any person making such affirmation shall be convicted wilfully, falsely and corruptly to have testified in any matter or thing, he or she so offending shall incur the same penalties and forfeitures as by the laws of this State are enacted against persons convicted of wilful and corrupt perjury.

Persons scrupulous of taking an oath may affirm. [Ib. § 9.]

Form of affirmation.

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Wilful and false affirmation punished as perjury.

SECT. 10. *Be it further enacted*, That if any person shall wilfully, falsely and corruptly swear or affirm, in giving or making any deposition or affidavit in this act provided to

Same penalties for false swearing in giving depositions as

(j) 1. A deposition taken *in perpetuam* cannot be used in evidence unless recorded within three months from its caption. *Bradstreet & al. vs. Baldwin*, 11 Mass. 229.

2. Nor in an action commenced before the taking of such deposition. *Greenfield vs. Cushman*, 16 Mass. 393. Altered—see additional act.

3. This statute has reference only to such depositions as are taken within this State. *Anonymous*, 3 Pick. 14.

CH. 87. be taken, he or she shall incur the same penalties, as if the testimony had been taken in open Court, and wilful perjury committed in giving the same. [Approved March 15, 1821.]

for false swearing in open Court.
[Ib. § 10.]

Additional Act, ch. 211, Vol. 3, p. 41.

Chapter 86.

AN ACT for the relief of Persons who are scrupulous of taking Oaths.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That whenever any person shall be required to take or subscribe any oath, before he enters on the discharge of any office, place or business, or on any other lawful occasion, and such person shall be conscientiously scrupulous of taking or subscribing an oath, he or she shall be permitted to make or subscribe affirmation, instead of the oath which is or may be by law prescribed, changing such parts of any such oath as ought to be changed, conformably to the Constitution of this State.

Certain persons, scrupulous of taking an oath, may take and subscribe an affirmation.
[Mass. Stat. Feb. 28, 1811, § 1.]

SECT. 2. *Be it further enacted,* That if any person shall wilfully, falsely and corruptly, make or subscribe any such affirmation as aforesaid, he or she shall be liable to the same pains and penalties as are or may be by law provided against persons who wilfully, falsely and corruptly take or subscribe the oath for which such affirmation is substituted. [Approved February 19, 1821.]

False and corrupt affirmation, to be punished as perjury.
[Ib. § 2.]

Chapter 87.*

AN ACT for admitting Inhabitants of Towns and certain other Corporations as Witnesses.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That in all suits at law whether of a civil or criminal nature, now depending, or that hereafter may be depending in any Court, or before any Jus-

Inhabitants of counties, towns, public corporations, &c. may be admitted as

tice of the Peace, within this State, wherein any county, town, public corporation, charitable, religious or literary incorporated society, is or may be a party, or interested in the event of the suit, any inhabitant of such county or town or member of such other incorporated society, shall and may be admitted as a competent witness ; and his deposition may be used, if duly taken, and for legal cause, in the trial of the cause as well for as against such county, town or other corporation : *Provided*, He hath no other interest therein, than as an inhabitant or member of such county, town or other corporation, and is not otherwise legally disqualified ; any law, usage or custom to the contrary notwithstanding. [Approved February 28, 1821.]

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witnesses, in actions where the counties, towns or corporations of which they are inhabitants or members are parties or interested.

Provided they have no other interest nor otherwise disqualified.

Chapter 88.

AN ACT regulating Damages on Inland Bills of Exchange.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That when any Bill of Exchange, drawn or endorsed within this State, payable at any place without the State, and within the United States, and the territories thereof, which upon being duly presented for acceptance or payment, shall not be accepted, or paid, according to the order of said bill, or the terms of said acceptance (if any) and shall thereupon be regularly protested, every person drawing or endorsing such bill within the State, who shall be liable by law for the contents of said bill, to any holder or party thereto, shall, in addition to the contents of said bill, and to the cost and lawful interest, be liable* for, and pay damages, at the following rates, viz. Upon all such bills payable within the States of New-Hampshire, Vermont, Massachusetts, Rhode-Island, Connecticut or New York, three per cent. on the amount of such bill ; if payable within the States of New-Jersey, Pennsylvania, Delaware, Maryland, Virginia or District of Columbia, five per cent. ; if payable within the States of North Carolina, South Caro-

In actions on protested Bills of Exchange payable out of this State.

[Mass. Stat. June 19, 1819, § 1.]

[See onward, ch. 101, § 3.]

[*396] Rule of estimating damages.

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On protested bills for \$100 or more, payable in the State at distance of 75 miles from place where drawn.

[Ib. § 2.]

Rule for estimating damages.

lina or Georgia, six per cent. ; if payable within any other of the United States, or the territories thereof, nine per cent.

SECT. 2. *Be it further enacted*, 'That when any Bill of Exchange, or order for the payment of money drawn or endorsed within this State, for one hundred dollars, or upwards, and payable at any place within the same, distant seventy-five miles or more, from the place where the same is drawn or endorsed as aforesaid, which shall not be duly accepted and paid according to the order of said bill, or if accepted, which shall not be paid according to the terms of the acceptance, the person drawing or endorsing the same, within this State at the distance of seventy-five miles or more from the place of payment, and who is liable by law, for the contents of said bill or order, to the holder thereof or any party thereto, shall, in addition to the contents of said bill or order, and lawful interest and cost thereon, be also liable for, and shall pay damages at the rate of one per centum on the amount thereof. [Approved February 28, 1821.]

Additional Act, ch. 272, Vol. 3, p. 100.

Chapter 89.

AN ACT regulating the admission of Attornies (a) and authorizing particular persons in certain cases, to prosecute and defend suits at law.

Qualification for admission to practice as

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled, That no person*

(a) 1. "An attorney who has collected debts for his client, *is not liable to an action for the money, till it has been demanded of him.*" *Staples vs. Staples & tr.* 4 *Glf.* 532.

2. "An attorney at law is liable to an action for money collected by him, in the same manner as any other agent, and without a special demand ; and the statute of limitations begins to run from the time he receives the money." *Coffin vs. Coffin*, 7 *Glf.* 298.

3. But where an attorney, in the exercise of his profession, has received money in satisfaction of a demand in favor of his client, it may be attached in his hands on a foreign attachment; though it was received in bank bills; and though it has not been demanded. *Ib.*

shall be admitted and allowed to be an Attorney of any Court in this State, unless he is a person of good moral character, and is well affected towards the Government and Constitution of this State, nor until he shall have faithfully devoted seven years at least to the acquisition of scientific and legal attainments,* whereof three years shall have been spent in professional studies, with some Counsellor at law, and two of the three with such Counsellor in this State;† and no person shall be admitted to practise as an Attorney in any Court of Justice within this State, until he shall in open Court have taken and subscribed the oath or affirmation prescribed in the Constitution of this State, and an oath, in tenor following :

You solemnly swear, that you will do no falsehood, nor consent to the doing of any in Court;—and if you know of an intention to commit any, you will give knowledge thereof to the Justices of the Court, or some of them, that it may be prevented; you will not wittingly or willingly promote or sue any false, groundless, or unlawful suit, nor give aid or consent to the same; you will delay no man for lucre or malice; but you will conduct yourself in the office of an Attorney within the Courts, according to the best of your knowledge and discretion, and with all good fidelity (b), as well to the Courts as your clients. So help you God.

Provided always, That if any person shall hereafter commence practice as an Attorney or Counsellor at law, in any place or in any Court in this State, without such previous term and course of studies, or taking such oath as aforesaid, or without paying into the county treasury the excise duty required by law, he shall not be entitled to demand or receive any remuneration for professional services.

SECT. 2. *Be it further enacted*, That the plaintiff or plaintiffs in any suit, shall not be allowed to manage their

CH. 89.

Attorney in Courts of this State.

[See additional act. Also, ch. 323, vol. 3, p. 174.]

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[† Part in italics repealed by ch. 467, vol. 3, p. 310.]

Attornies to be sworn in open Court.

Form of oath.

[Mass. Stat. Nov. 4, 1784.]

Without having complied with such requisitions not entitled to pay for services.

Two attornies only, allowed on each side.

4. *Assumpsit* lies against an attorney for negligence in transacting the business of his profession; and this cause of action survives against his administrator. *Stimpson vs. Sprague*, 6 Glf. 471.

5. He will be liable if he neglects seasonably to sue a *scire facias* against bail, if *non est inventus* be returned on the execution sued out by him. *Dearborn vs. Dearborn*, 15 Mass. 316.

6. When an attorney disobeys the lawful instructions of his client, and a loss ensues, the attorney is responsible for such loss. *Gilbert vs. Williams*, 8 Mass. 51.

(b) Where a practitioner held a paper, delivered to him by his client, which the grand jury was desirous of seeing, the court held him not bound to produce it. *Anon.* 8 Mass. 370.

CH. 89. cause by more than two Attornies, nor shall any defendant be allowed to employ a greater number.

Any person of good moral character may appear by special power.

[Mass. Stat. Mar. 6, 1790.]

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SECT. 3. *Be it further enacted,* That every citizen be, and hereby is, authorized to appear in any Court, and before any tribunal, Judge, Justice of the Peace or Magistrate, to prosecute and defend his suit or action by himself and by any person of a decent and good moral character, whom he shall call to his aid or appoint for that purpose; and that any person of such decent and good moral character, who shall produce in Court a power or letter of Attorney, specially for that purpose, from any person whomsoever, shall have full authority, though his principal be absent, to prosecute and* defend any suit or matter, wherein his principal shall be concerned, to final judgment and execution; and to plead, implead, or manage the same case as fully as if such person, so authorized, was an Attorney of such Court, and admitted and sworn in usual form as prescribed by law, and agreeably to the rules of such Court.

No person shall be counsel in a cause in which he has acted as Judge, &c.

No Justice shall sit in a cause commenced by him, &c.

No Sheriff or deputy shall act as attorney in a cause or draw writs, pleas, &c.

[Mass. Stat. Mar. 12, 1784, § 8.]

SECT. 4. *Be it further enacted,* That no person shall engage or be employed as Counsel or Attorney, before any Court within this State, in any action which he shall have determined as Judge or Justice of the Peace; and if any person as aforesaid, shall appear as Counsel or Attorney in any action or suit, he shall not be permitted to prosecute, defend, answer to, or manage, such action or suit. And no Justice of the Peace within this State, shall hear or determine any civil action which shall have been commenced by himself or by his order or direction, and every civil action commenced as aforesaid shall abate.

SECT. 5. *And be it further enacted,* That no Sheriff or deputy Sheriff shall be suffered to appear in any Court, or before any Justice of the Peace, as Attorney to, or in behalf of, or assisting, or advising to any party in a suit; nor shall any Sheriff or his deputy be allowed to draw, make or fill up any plaint, declaration, writ or process (c), or to draw or

(c) Where a deputy sheriff, having in his hands a writ and by direction of the creditor's attorney, though not in his presence, altered the date of the return day of the writ, and attached upon it property of the debtor, it was

make any plea for any other person; but all such acts done by either of them shall be void (*d*). [Approved February 10, 1821.] CH. 90.

Chapter 90.

AN ACT providing for the appointment of Clerks of the Courts in the several Counties, and requiring them to render an account of all monies received.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That there shall be nominated and appointed by the Governor† with the advice of the Council during pleasure, one person in each county in this State, who shall be Clerk of all the Judicial Courts, holden in the same county, and shall have the care and custody of all the records, files and proceedings which have heretofore been had and now remain in the respective offices of either* of the Clerks of the Supreme Judicial Court or Circuit Court of Common Pleas; and who shall be Clerk of all the Judicial Courts holden in the same county, under the authority of this State, and who shall do and perform all the duties, services, acts, matters and things, which he as Clerk of either of said Courts ought by law to do and perform.

Clerk to be appointed by Governor and Council.

[† See ch. 422, vol. 3, p. 266, and act passed Feb. 15, 1832.]

[*399]

To be Clerk of all the Courts.

SECT. 2. *Be it further enacted*, That the several Clerks to be appointed by virtue of this act, shall keep a true and exact account of all the monies they shall receive, by virtue of their office, and shall on the first Wednesday of January annually render to the Treasurers of their respective counties under oath, a true account of the whole sum thus by them received, and after deducting one thousand dollars, (if they shall have received so much,) which shall be held and retained for their own use, they shall pay over the one half of all the residue to their respective county Treasurers for the use of the county.

To keep an account of fees.

[Mass. Stat. June 18, 1811, § 2.]

[See ch. 507, vol. 3, p. 355.]

Emoluments.

held that the writ was void as against a creditor at whose suit he subsequently attached the same property. *Clarke Jr. & al. vs. Lyman*, 10 Pick. 45.

(*d*) This means "voidable." *Smith vs. Saxton*, 6 Pick. 487.

CH. 90.

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Clerks to give
bonds.

[Ib. § 3.]

Condition.

SECT. 3. *Be it further enacted*, That every such Clerk before he shall enter upon the duties of his office, shall be sworn or affirmed to do and perform all the duties appertaining to his office ; and such Clerk shall also give bond to the State to the acceptance of the Governor and Council in a penal sum not less than eight thousand dollars, with two or more sureties, conditioned that he will well and faithfully do and perform all the duties, and pay over all the monies he is required by this act to do and perform, and for the safe keeping and immediate delivery of all the records, files, papers, and muniments in said office to his successor on his leaving said office, which bond shall be lodged in the office of the Treasurer of this State.

To account to
the county
treasurer in 30
days.

[Ib. § 4.]

[See ch. 507,
vol. 3, p. 355.]

SECT. 4. *Be it further enacted*, That each of the Clerks aforesaid shall be required to pay over to the Treasurer of the county, for which he may be appointed, all monies received by him, which has heretofore been ordered to be paid into the county treasury for the use of the county or State within thirty days from the adjournment of the Courts, at which he may have received the same.

Clerks now in
office to con-
tinue.

[*100]

Court to ap-
point a Clerk in
certain cases.

SECT. 5. *Be it further enacted*, That the Clerks now in office, shall continue to do and perform all the duties of their respective* offices until the first day of August next, and until others are appointed and qualified according to the provisions of this act. And in case of a vacancy in said office, or the absence of any Clerk, the Judges of the several Courts, are hereby authorized and empowered to appoint a Clerk who is hereby authorized to do and perform all the duties of Clerk, during such vacancy or absence ; and it shall be the duty of the several Clerks now in office to deliver over to their successors all the records, files and papers in their respective offices immediately upon the appointment of such successor.

SECT. 6. *Be it further enacted*, That this act shall take effect, and have force from and after the first day of August next, and all acts and parts of acts inconsistent with the provisions contained in this act are hereby repealed. [Approved June 27, 1820.]

Chapter 91.

CH. 91.

AN ACT providing that Bonds shall be given by Sheriffs and Coroners to the Treasurer of this State, and giving remedies thereon.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That every person appointed to the office of Sheriff within this State, shall, within sixty days from the receipt by him of his commission; and every Sheriff now in office unless another shall sooner be appointed in his place, shall within sixty days next after the passing of this act, make and execute a bond, with at least three sufficient sureties residing within this State, in a sum not less than twenty-five thousand dollars for such person who now is or shall be appointed Sheriff in either of the counties of York, Cumberland, Lincoln and Kennebec; and in a sum not less than fifteen thousand dollars, for such person who now is or shall be appointed Sheriff of either of the other counties in this State, to the Treasurer (a) thereof, and his successors in said office conditioned for the faithful performance of the duties of their respective offices, and to answer for the neglects and misdoings of their respective deputies (b), which bond shall by the said Sheriffs, within

Sheriffs to give bond.

[Mass. Stat. Mar. 12, 1794, § 1.]

Condition.

(a) The treasurer is a mere trustee of the bond for the use of those who may suffer by a breach of its condition. *Skinner vs. Phillips & als.* 4 Mass. 68; *Crocker vs. Fales & al.* 13 Mass. 260.

(b) 1. A sheriff is answerable *civiliter* for the misfeasance or nonfeasance of his deputy in the duties enjoined on him by law; but not for the breach of a contract, made with the plaintiff, to do what by law he is not obliged to do. *Marshall vs. Hosmer*, 4 Mass. 60; *Bond vs. Ward*, 7 Mass. 123.

2. An action for a neglect of duty by a deputy sheriff, may be brought either against the deputy or the sheriff. *Draper vs. Arnold*, 12 Mass. 449.

3. Trespass *vi et armis* lies against a sheriff for the act of his deputy. *Grinnell vs. Phillips*, 1 Mass. 530.

4. A sheriff is answerable for his own, or deputy's default, in the service of process in a civil action, to none but the plaintiff or defendant in such action. *Harrington vs. Ward*, 9 Mass. 251.

5. The sheriff can give nothing in evidence, when sued for a misfeasance of his deputy, which his deputy could not, were he the defendant; and neither can falsify his return. *Gardner vs. Hosmer*, 6 Mass. 327. Yet where a deputy sheriff on an original writ against a debtor, who was in extreme sickness and poverty, arrested the debtor, and returned that he had taken

CH. 91. the time* aforesaid, be filed in the office of the Clerk of the Court of Sessions, for the county in which said Sheriffs are respectively commissioned; and said bond shall be presented at the term of said Court of Sessions, which shall then next be holden in such county; to be by said Court approved, and when the same shall have been adjudged sufficient, the Clerk shall make record thereof, and certify the same on said bond, and a copy thereof being taken by said Clerk, he shall deliver the original to the Sheriff, who shall file the same in the office of the Treasurer of the State, within twenty days, after the same shall have been so approved.

To be approved by Sessions.

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[*401]

Duty of county attorney.

[Mass. Stat. Feb. 27, 1795, § 1.]

Sufficiency of the bond to be certified annually.

SECT. 2. *Be it further enacted*, That it shall be the duty of the county Attorney in each county respectively at the term of the Court of Sessions which shall be held therein on or next after the third Tuesday of June annually, to move the said Court to consider of the sufficiency of the security given by the Sheriffs in their respective counties, and they shall cause a record to be made of such determination by the Clerk, who shall certify the same to the Treasurer within thirty days thereafter, and if such security shall be adjudged insufficient, said Clerk shall also within ten days certify the same to the Sheriff of such county, who shall within

built, when in fact he had not; the sheriff, in a suit against him for this false return, was permitted to show these facts in evidence in mitigation of damages, and that the debtor, having recovered his health, did not conceal himself. *Weld vs. Bartlett*, 10 Mass. 470.

6. Action lies against the sheriff for taking insufficient bail. *Sparhawk vs. Bartlett*, 2 Mass. 188.

7. Not necessary in such action to aver that the sheriff knew the bail to be insufficient. *Ib.*

8. In an action against the sheriff for taking insufficient bail, the jury may assess the damages as they shall estimate the plaintiff's real loss arising from the officer's neglect. *Shackford & ux. vs. Goodwin*, 13 Mass. 187. Such action may be preceded in without any previous proceedings against the bail. *Rayner vs. Bell*, 15 Mass. 377.

9. When goods are attached upon an original writ, and replevied out of the hands of the sheriff by a coroner, the creditor in the original suit cannot maintain an action against the coroner for taking insufficient pledges, upon the replevin, or for other misfeasances in the service of it. Such action lies for the sheriff only, who had a special property in the goods, the general property being in abeyance. *Ladd vs. North*, 2 Mass. 514.

twenty days after such notice, give a new bond with sufficient sureties, to be filed and approved as aforesaid, and if any county Attorney or Clerk shall neglect his duty in this particular, such Attorney or Clerk, shall forfeit and pay to the use of this State one hundred dollars, for each neglect, to be recovered by action of debt in the name of the Treasurer, whose duty it shall be to prosecute therefor.

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SECT. 3. *Be it further enacted*, That if any Sheriff shall neglect to give the security required in the first section of this act, and file the same in the office of the Treasurer of the State, or shall neglect to give the new security which may be required by the Justices of the Court of Sessions in his county, as herein before required and file the same in the Treasurer's office as aforesaid, he shall forfeit and pay to the use of this State, the sum of one hundred and fifty dollars for each month's neglect, to be recovered by action of debt in any Court proper to try the same; and it shall be the duty of the Attorney General to prosecute for the same, and* the name of such Sheriff neglecting to give or renew his security as aforesaid, shall be certified by the Court of Sessions, holden in his county to the Governor and Council, and also to the Attorney General; and the Governor with the advice of Council, shall thereupon remove such Sheriff from his office, and appoint some other person in his stead, unless reasonable cause to the satisfaction of the Governor and Council, shall be assigned for said neglect. And unless said Sheriff, whose name and neglect shall be certified as aforesaid, shall give or renew his security as the case may be, to the satisfaction of the Governor and Council within twenty days after the said certificate shall be made as aforesaid.

Penalty for neglecting to give bond.

[Ib. § 2.]

[*402]


To be removed.

SECT. 4. *Be it further enacted*, That it shall be the duty of the Treasurer of the State, on the first Wednesday of January annually to make out a statement of the amount of all warrants in favour of the State, any other sums of money or balances that may be in the hands of, and due from the several Sheriffs† in said State, and lay the same before the Governor and Council for their inspection, and shall also certify the names of the sureties, on their respective bonds, that in case they or any of them shall have become insufficient, or

Treasurers to state the amount of warrants,

[†See ch. 188, § 2, vol. 8, p. 7.]

and certify the names of sureties.

CH. 91.  have moved out of the State, others may be required, and whenever for either of the reasons, it shall be deemed necessary by the Governor and Council, a new bond shall be given by any Sheriff thereto required, within sixty days after notice given him for that purpose, to be filed as aforesaid; and on neglect thereof, the office of such Sheriff shall become vacant, and the Governor with advice of Council, shall appoint some other person thereto.

Coroners to
give bonds.

[†See additional
act.]

Condition.

[*403]

Or their acts
to be void.

Persons ag-
grieved enti-
tled to a copy
of bond,

and to sue.

"

Proviso.

SECT. 5. *Be it further enacted*, That all Coroners, who shall be appointed in any county in this State, before proceeding to discharge the duties of their office, shall give unto the Treasurer of the State a (c) bond† with sufficient sureties, to the satisfaction of the Court of Sessions, in their respective counties, for the faithful performance of the duties of their said office, and the acts and doings of all Coroners now in office, who shall not within sixty days, from and after the passing of this act, make out and execute to the Treasurer of said State a bond with sufficient sureties, and the same file* in the Clerk's office of the county in which such Coroner resides, to be approved as aforesaid, all their acts and doings after the said sixty days, shall be null and void, and they shall be deemed to have forfeited their respective offices, and all authority to act under their commissions shall cease from and after that time.

SECT. 6. *Be it further enacted*, That any person aggrieved at the neglect or misdoings of any Sheriff or his Deputy, or of any Coroner, and having first ascertained the amount of his damages by judgment against said Sheriff or Coroner, shall be entitled to a certified copy of such Sheriff's or Coroner's bond, and shall have a right to commence and prosecute to final judgment and execution for his own benefit, any action thereon in the name of the Treasurer, said writ being first endorsed by the party for whose benefit such action is brought, or his agent or attorney, which endorser shall be alone answerable for all costs; and judgment, when for the defendants, shall be rendered accordingly against the party, for whose benefit such action is brought; *Provided*,

(c) To the validity of a coroner's bond a formal approbation of the court on record is not necessary. *Apthorp vs. North & als.* 14 Mass. 167.

That all such actions on Sheriff's and Coroner's bonds, shall be brought always in the county where such Sheriff or Coroner shall have been commissioned respectively to act. CH. 92.

SECT. 7. *Be it further enacted*, That when judgment is rendered on any bond as aforesaid, execution shall be awarded for the sum found due to the party, for whose benefit said action was brought; and being part of the penalty forfeited. And any execution which shall issue on said judgment, shall express therein the name of the party for the use and benefit of whom the same was awarded, who may cause said execution to be levied on any personal or real estate of the debtor, which levy shall inure to such party for his sole use and benefit, to every intent and purpose whatever. [Approved June 24, 1820.] Execution how awarded.

Additional Act, ch. 433, Vol. 3, p. 278.

Chapter 92.*

[*404]

AN ACT defining the general Powers and Duties, and regulating the office of Sheriffs and of Constables.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That the Sheriff of each county in this State, shall have power, and it shall be his duty, and the duty of each of his deputies, to serve and execute within his county, all (a) writs and precepts to him or Sheriff to serve all precepts, &c.
[Mass. Stat. Mar. 12, 1784, § 1.]

(a) 1. See ante, p. 393, note i.

2. Under this act, in an action against a banking corporation in which a deputy sheriff is a stockholder, the suit may be served by another deputy of the same sheriff. *Adams vs. Wincasset Bank*, 1 *Gl.* 361. See note b, next chapter; also, *Gage vs. Graffam*, 11 *Mass.* 183.

3. It is a general and known principle, that executive officers, obliged by law to serve legal writs and processes, are protected in the rightful discharge of their duty, if those precepts are sufficient in point of form, and issue from a court or magistrate having jurisdiction of the subject matter. If such magistrate proceed unlawfully in issuing the process, he, and not the executing officer, will be liable for the injury consequent upon such act. *Sanford vs. Nichols*, 13 *Mass.* 288.

4. Where a sheriff has reason to doubt whether goods are the property of

CH. 92.

including those in which their own towns are interested, or parties. Sheriffs and deputies, out of office, to serve precepts in their hands, &c.

Sheriff to have care and custody of gaols.

In case of death of Sheriff, his gaoler to continue in office until, &c.

them directed and committed, issued from good and lawful authority; including all writs and processes in which towns of which they are inhabitants are parties or interested (b). And all Sheriffs, when removed from their office, as well as their deputies, shall have power to execute all such precepts as may be in their hands at the time of their removal from office; and in every case of a vacancy in the office of Sheriff in any county, by death, resignation, removal or otherwise, every Deputy Sheriff in office under such Sheriff, having any writ or precept in his hands, at the time of such vacancy, shall have the same authority, and shall be under the same obligation to serve, execute and return such writ or precept, as if such Sheriff had continued in office (c). And the Sheriff of each county shall have the custody, rule, and charge of the gaol or gaols therein, and of all prisoners within such gaol or gaols, and shall keep the same himself personally, or by his deputy, for whom he shall be answerable; and in case of the death of the Sheriff of any county, any gaoler, by him specially appointed, shall continue in the office of

a debtor, he may insist on the creditor's showing them to him, and also on being indemnified for any mistake he may make, in conforming to the creditor's direction, either in attaching such goods, or in seizing them upon execution. *Bond vs. Ward, 7 Mass. 123.*

5. But if he, without making such claim, undertakes to execute the precept as well as he can, he is answerable for not attaching the debtor's goods when in his power, if the creditor be injured by his neglect. *Id.*

6. If the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods, that the officer on due enquiry cannot distinguish them, the owner can maintain no action against the officer for taking them, until notice and a demand of his goods, and a refusal or delay of the officer to redeliver them. *Id.*

(b) See note b, 6, to next chapter.

(c) Where a warrant of distress was committed to a deputy sheriff and before the return day of the warrant the sheriff resigned his office, and a successor was appointed, who re-appointed the same person as his deputy, part of the money due on the warrant having been collected by the deputy before such resignation and the remainder after such re-appointment, and the whole having been embezzled by the deputy, it was holden that the first sheriff was responsible for the whole amount embezzled, and the sureties in the deputy's bond were holden to the sheriff therefor. *Learned vs. Allen & als. 13 Mass. 295.*

gaoler, and retain and have the custody, rule and charge of the gaol of which he had the custody, rule and charge under such Sheriff;† and of all prisoners within such gaol, or who may be afterwards committed to his custody, until a successor to such deceased Sheriff shall be appointed and qualified as the law directs; or until the Governor, by and with the advice of the Council, shall remove such gaoler and appoint another person; which removal and appointment, the Governor, by and with the advice of the Council, is hereby authorized to make. And the gaoler (*d*) so appointed, shall give such bonds, and in the same manner, as is required of a Sheriff, for the faithful performance of the duties* of his office; and shall continue in office during the vacancy in the office of Sheriff.

CH. 92.

[†See additional act.]

Governor may appoint gaoler, when the Sheriff's office is vacant.

[Mass. Stat. Feb. 24, 1809, § 1.]

Such gaoler to give bond, &c.

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SECT. 2. *Be it further enacted*, That the defaults or misfeasances in office, of any gaoler, or deputy Sheriff, after the death or resignation of any Sheriff, by whom he was appointed shall be adjudged a breach of the condition of the bond given by such Sheriff: and actions for the misfeasance or misfeasance of any Sheriff, or of any of his deputies, may be sued against the executors or administrators of such Sheriff, in the same manner as if the cause of such action survived against the executor or administrator at the common law; and an attested copy of any Sheriff's bond, certified by the Treasurer of this State, shall be received as evidence in any case: *Provided nevertheless*, That if in any suit the execution of the bond shall be disputed, the Court may order the Treasurer to bring the original bond with him into Court.

Condition of Sheriff's bond to extend to breaches by gaoler or deputy Sheriff after Sheriff's death or resignation.

Actions may be sued against executors of sheriffs.

Copy of Sheriff's bond, certified by Treasurer of State—legal proof.

SECT. 3. *Be it further enacted*, That if any Sheriff or his deputy, shall unreasonably neglect or refuse to pay to any person, any money received by him upon execution to the use of such person, upon demand thereof being made, he shall forfeit and pay to such person five times the lawful interest of such money, so long as he shall so unreasonably detain the same after such demand (*e*) is made.

Sheriff neglecting to pay over monies collected on execution, liable to 30 per cent. interest. [Mass. Stat. Mar. 12, 1784, § 2.]

(*d*) A deputy of the sheriff, in his capacity of keeper of the gaol, is not, in any sense, a deputy sheriff. The offices seem to be distinct in their nature. *Gage vs. Graffam*, 11 Mass. 182.

(*e*) The Sheriff is liable to pay the thirty per cent. interest, in case of the

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Sheriff's body
not liable to
arrest, &c. in
civil action.

[Ib. § 4.]

In case execu-
tion against
Sheriff be re-
turned unsatis-
fied, creditor
may lay a copy
before Govern-
or and Council.

If debt be not
paid within 40
days after no-
tice, Sheriff to
be removed.

[*406]

Sheriff to be
answerable to
his successor
for all prison-
ers, &c.

When sheriff
is removed,
execution to be
issued against
him in com-
mon form.

Sheriff to bury
the bodies of
debtors dying
in prison, if

SECT. 4. *Be it further enacted*, That no Sheriff shall have his body arrested upon mesne process, or upon an execution awarded upon a judgment consequent upon a civil action, and that when judgment shall be rendered against any person holding the office of Sheriff, either in his official or private capacity, for any sum of money, the execution thereof shall be issued against his goods, chattels and lands, but not against his body; and if any execution issued against the goods, chattels or lands of a person who holds the office of Sheriff, shall be returned not satisfied, the creditor may file before the Governor and Council an attested copy of such execution and return, and also serve such Sheriff with a copy of such copy filed, attested by the Secretary together with notice under the hand of the Secretary, of the day of filing such copy. And if such Sheriff shall not, within forty days next after his being served with such copy and notice* pay the creditor the full of his debt, together with reasonable costs of the copies and notifications aforesaid, the Governor, with the advice of Council, shall remove such Sheriff from his office, and shall appoint some other person to the same. And such Sheriffs shall be held answerable for the delivery over to their respective successors, of all prisoners which may be in their custody at the time of their removal, and for that intent shall still retain the keeping of the gaol or gaols in their respective counties, and the prisoners therein, until their successors shall be appointed and qualified, as the law directs. And when a Sheriff shall be removed from his office, the Clerk of the Court, from whence executions have been issued and returned not satisfied, shall be empowered as soon as another Sheriff shall be appointed and legally qualified, to make out alias executions in common form, as well against the body as the goods, chattels, and lands of such persons so removed.

SECT. 5. *Be it further enacted*, That when any person imprisoned for debt, or any other cause, shall die in any county of this State, it shall be the duty of the Sheriff or de-

neglect of his deputy; and from the time the demand is made upon the deputy. *Esty & al. vs. Chandler*, 7 Mass. 486; *Barnard & als. vs. Ward*, 9 Mass. 289.

puty gaoler to deliver the body of such deceased person to his relations or friends, if they shall request it; and if no application be made for such body, it shall be the duty of the Sheriff, or deputy gaoler, to bury the same in the common burying ground; and the expenses thereof shall be paid by the town in which such person had a legal settlement, if such person had been an inhabitant of this State; otherwise the expenses aforesaid shall be paid out of the Treasury of this State.

SECT. 6. *Be it further enacted,* That the Clerk of the Supreme Judicial Court, and Circuit Court of Common Pleas, shall, within fifty† days after the end of their Courts respectively, return into the office of the Treasurer of the State, a certificate of all fines, amercements, issues and forfeitures arising or imposed to the use of the State, by their respective Courts, on penalty of seventy dollars for each and every neglect, to be disposed of as follows, viz.—The one moiety to him or them who shall sue for the same, and the other moiety to the benefit of this State; and the Attorney General as well* as the county Attornies within their respective counties, be, and hereby are especially directed and enjoined to give information of, and prosecute for recovery of all such fines and forfeitures as may be incurred by the Clerks aforesaid, in consequence of their breach of this act: and the said Clerks shall respectively return a like certificate into the Secretary's office, that the Legislature may thereby be enabled to settle with the Treasurer; and each Clerk of the Courts shall certify to the Treasurer of his county, the fines arising to the county from time to time, from convictions in the Circuit Court of Common Pleas, and the Supreme Judicial Court; and the Circuit Court of Common Pleas shall audit and settle the Sheriff's accounts for such fines, as shall have been by them imposed, and for forfeitures arising in said Courts respectively, and thereupon grant the Sheriff a full discharge:

SECT. 7. *Be it further enacted,* That any Sheriff, deputy Sheriff or Constable, being in the execution of his office, for the preservation of the peace, or for the apprehending or securing any person or persons for breach of the same, or for

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not delivered
to their friends.
[Mass. Stpt.
Feb. 13, 1912,
§ 1.]
Expenses how
to be paid.

Clerks of
Courts to re-
turn to State
Treasurer cer-
tificate of all
fines, &c.
[†See addi-
tional provi-
sions, ch. 464,
§ 3, vol. 3, p.
306.]
Penalty for
neglect.
[Mass. Stat.
Mar. 12, 1794,
§ 2.]

[§ 497]

Similar certi-
ficates to be re-
turned to the
Secretary's of-
fice.

[See ch. 303,
vol. 3, p. 143.]

C. C. Com.
Pleas to audit
and settle Sher-
iff's account
for fines, &c.
in that Court.

Sheriffs, Con-
stables, &c.
may require
aid in criminal
cases.

CH. 92. any other criminal cause shall have lawful authority to require suitable aid and assistance therein. And if any person, being required by any Sheriff, deputy Sheriff or Constable in the name of the State, to aid and assist him in the execution of his office, as aforesaid, shall neglect or refuse so to do, and be thereof convicted, before any Court proper to try the same, such offender shall be fined, to the use of the county where the offence shall be committed, not less than three dollars, nor more than fifty dollars, according to the circumstances of the case; and if any such offender shall be unable, or shall not forthwith pay the said fine, such Court may punish him by imprisonment not exceeding thirty days.

(Mass. Stat. Feb. 26, 1786, § 1.)
Penalty for refusal.

Penalty for a person assuming to act as sheriff, &c.

[*ib.* § 2.]

[*499]

Constables may serve writs and executions in personal actions to amount of \$100.

SECT. 8. *Be it further enacted (f),* That if any person not being really and bona fide a Sheriff, deputy Sheriff or Constable, shall pretend himself to be either of said officers, and take upon himself to act as such, or to require any person or persons to aid or assist him in any matter appertaining to the duty of Sheriff, deputy Sheriff or Constable, he shall be fined not exceeding four hundred dollars, according to the circumstances* of his offence; one moiety thereof to the use of the State, and the other moiety to him or them who shall prosecute therefor.

SECT. 9. *Be it further enacted,* That any Constable in any town or plantation within this State, be, and he hereby is, authorized and empowered to serve upon any person or persons in the town or plantation to which he may belong, any writ, summons, or execution, in any personal (g) action,

(f) 1. Where the plaintiff in an action served his own writ by leaving a summons with the defendant, and made a return of the same, with an attachment of property thereon, in the name of J. D. a deputy sheriff; this was held not to be "pretending himself to be a deputy sheriff" nor acting as such; and therefore not indictable under § 8. *Coffin's Case*, 6 *Gl.* 231.

2. The court will not decide, in an action between other parties, whether a person claiming to be sheriff of a county, and actually executing the duties of the office, be sheriff of the county *de jure*. *Fowler vs. Beebe & al.* 9 *Mass.* 231; *Bucknam vs. Ruggles*, 15 *Mass.* 183.

(g) 1. A constable is not authorized to serve an original writ in a real action. *Hart vs. Hutchins*, 6 *Mass.* 399.

2. Where an original writ, within the authority of a constable to serve as it respects the *ad damnum*, was served by a constable, although not di-

where the damage sued for or recovered shall not exceed one hundred dollars ; including all writs and processes to them duly directed, in which towns or plantations of which they are inhabitants, are parties or interested, and return thereof to make to the Court to which the same may be returnable:

Provided however, That every Constable, after being chosen, and before he serve any writ, or proceed to collect any execution, shall give to the Treasurer of his town, a bond in the sum of two hundred dollars, with two sureties, sufficient in the opinion of the Selectmen and town Clerk, for the faithful performance of his duties and trust, as to all processes by him served or executed ; and for every process he shall serve or execute before giving such bond, he shall forfeit and pay not less than twenty (*h*), nor more than fifty dollars, recoverable to the use of any person, who shall sue for the same ; and all persons suffering through the defaults or misdoings of such Constable, shall have the same remedies in law, on his bond, as are provided in respect to Sheriffs' bonds, and the like proceedings in both cases shall be had, such changes being made, as will make the process effectual.

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Provided they give bond to town Treasurer in \$200.

Penalty for acting before giving bond.

Remedy on Constables' bond.

SECT. 10. *Be it further enacted*, That any Constable of any town or plantation within this State, shall have authority, in the execution of the warrant, or writ to him directed by lawful authority, to convey as well any prisoner or prisoners, as things that they may have taken into their custody, either to the Justice issuing such warrant or writ, or to the common gaol or house of correction of the county where such Con-

Constables, in serving warrants or writs, may carry prisoners & things taken by them, to the Justice or prison.

[Mass. Stat. Feb. 26, 1796, § 4.]

rected to him, the plaintiff had leave to amend his writ, by inserting a direction to the constable. *Hearsey vs. Bradbury*, 9 Mass. 96. See also, *Campbell vs. Stiles*, *ib.* 217. But where an execution was altered by fraudulently inserting a direction to a constable, it was held that payment to such officer did not discharge the debt, and parol proof of such alteration was admitted. *Brier vs. Woodbury & al.* 1 Pick. 362.

3. When a deputy sheriff is a party to the action, a constable may serve the precept, if within the limitation of the statute, notwithstanding the provisions of § 1, in the next chapter, that writs, &c. where the sheriff or his deputies may be parties, shall be served by a coroner. *Briggs & al. vs. Strange*, 17 Mass. 408.

(*h*) In an action against a constable for this penalty, it is necessary that the amount of the debt should be set forth, that it may appear that the precept was within his authority to serve. *Barter vs. Martin*, 5 Glf. 76.

CH. 93. stable is an inhabitant, according as in the writ or warrant may be directed. [Approved March 19, 1821.]

Additional Act, ch. 461, vol. 3, p. 302.

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Chapter 93.*

AN ACT describing the Duty and Power of Coroners.

Power and duty of Coroners in service of legal process;

[Mass. Stat. Mar. 12, 1784, § 1, 3, and June 28, 1792.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled, That every Coroner within the county for which he is appointed, shall (a) serve all (b) writs and precepts, when the Sheriff or either of his deputies shall be a party to the same; and shall, if present in Court, return Jurors de talibus circumstantibus, in all causes where the Sheriff of the county shall be interested or related to either party. And when the office of Sheriff in any county may be vacant by death, resignation, removal or otherwise, the several Coroners of such county be, and they hereby are respectively authorized and empowered to execute and return all writs and precepts, which are by law appointed to be executed and returned by the Sheriff, until an-*

(a) After the passing of the act of March 12, 1784, a coroner had no power to appoint deputies. *Goodenow vs. Buttrick*, 7 Mass. 142.

(b) 1. See note a, 2, and g, 3, of last preceding chapter.

2. Processes served by a deputy sheriff, where another deputy of the same sheriff is a party, are not for that cause void. On motion, or plea, the proceedings will be set aside; but if the defendant appears and answers, it is not error. *Gage vs. Graffam*, 11 Mass. 181.

3. A deputy sheriff may lawfully serve a writ upon a deputy gaol keeper of the same sheriff. *Id.* See note d, last preceding chapter.

4. A coroner who is also a deputy sheriff, may serve process upon another deputy of the sheriff. *Colby vs. Dillingham & als.* 7 Mass. 475.

5. If an original writ against the inhabitants of a town, of which a deputy sheriff is one, be served by the sheriff, it is good cause of abatement. *Broken vs. New Gloucester*, 14 Mass. 216. But—

6. The statute of 1817, ch. 13, removes the disability of a deputy sheriff to serve process in which the town where he resides is a party, and also from the sheriff and all his other deputies. *Bristol vs. Marblehead*, 1 Giff. 82.

other Sheriff for such county shall be appointed and legally qualified ; and such Coroners shall have notice thereof, which it shall be the duty of every person who may hereafter be appointed Sheriff of any county, and legally qualified to execute said office, to give, as soon as may be, to the respective Coroners of the same county: and they shall take inquests of violent deaths committed, and casual deaths happening within their respective counties, and shall, before they enter upon the duties of their office, be sworn to the faithful discharge thereof, and give security before they proceed to act, in the manner prescribed in "An Act passed on the twenty-fourth day of June in the year of our Lord, eighteen hundred and twenty, entitled "An Act providing that bonds shall be given by Sheriffs and Coroners to the Treasurer of this State, and giving remedies thereon ;" and the same proceedings in all respects shall be had respecting Coroners' bonds and sureties ; and Coroners shall be liable to the same forfeitures for like causes, to be recovered in like manner ; and subject to removal from office in the same way, and to be proceeded against in the same manner in all respects, as are provided in the act aforesaid with regard to Sheriffs.

CH. 93.

and in taking inquests of violent or casual deaths, &c.

To give security in the same manner as sheriffs.

Same proceedings on their bonds, as Sheriffs.
[Mass. Stat., Feb 29, 1818.]
Subject to removal as Sheriffs.

SECT. 2. *Be it further enacted, That each Coroner shall, as soon as he shall be certified of the dead body of any person* supposed to have come to his death by violence or casualty, found or lying within his county, make out his warrant directed to the Constable of the town where the dead body is found or lying, or to the Constables of one or more of the three or four next adjacent towns, requiring them forthwith to summon a Jury of good and lawful men of the same town or towns, sufficient to make up nine in all, to appear before him at the time and place in such warrant mentioned and expressed ; which warrant shall be in form following :*

Mode of proceeding to take an inquest.

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[Mass. Stat. Mar. 12, 1784, § 2.]

(SEAL.) — ss. To either of the Constables of D — in the said county of S —,

Greeting.

These are in the name of the State of Maine, to require you immediately to summon and warn — good and lawful men of the said town of B — to appear before me, one of the Coroners of the said county of S — at the dwelling house of —, or at a place called — within the said town of B — at the hour of — then and there to inquire upon the view of the body of — there lying dead, how and in what manner he came to his death. Fail not herein at your peril. Given under my hand and seal, at B — the — day of — in the year of our Lord, —.

Form of warrant.

W G.

Cm. 93.

Constables' duty.

And every Constable to whom such warrant shall be directed and delivered, shall forthwith execute the same, and shall repair to the place where the dead body is, at the time mentioned, and make return of the warrant with his doings thereon, unto the Coroner that granted the same. And every Constable failing unnecessarily of executing such warrant, or of returning the same as aforesaid, shall forfeit the sum of ten dollars. and every person summoned as a Juror as aforesaid, that shall fail of appearance without having reasonable excuse therefor, shall forfeit seven dollars ; which forfeitures shall be recovered by action of debt before any Court that can take cognizance of the same, and shall be applied to the use of the county. And the Coroner shall swear six or more of the Jurors that shall appear, and shall give the foreman by him appointed, his oath upon view of the body, in form following :

Punishy for neglect of Constable.

Punishy for non-attendance of Juror.

Coroner to swear Jurors:

and form of oath.

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You solemnly swear that you will diligently inquire and true presentment make on behalf of this State, how and in what manner A B who lies here dead, came to his death, and you shall deliver up to me, one of the Coroners of this county, a true inquest thereof, according to such evidence as shall be laid before you, and according to your knowledge. So help you God.

And then shall swear the other Jurors in form following :

Such oath as your foreman hath taken, you and each of you shall well and truly observe and keep. So help you God.

Coroners' charge to Jury.

And the Jurors being sworn, the Coroner shall give them a charge upon their oaths, to declare of the death of the person, whether he died of felony, or of mischance, or accident ; and if of felony, who were principals, and who were accessaries ; with what instrument he was struck or wounded, and so of all prevailing circumstances, which may come by presumption ; and if by mischance or accident, whether by the act of man, and whether by hurt, fall, stroke, drowning or otherwise ; to inquire of the persons who were present, the finders of the body, his relations and neighbors, whether he was killed in the same place where he was found, and if elsewhere, by whom, and how he was brought from thence ; and of all circumstances relating to the said death. And if he died of his own felony, then to inquire of the manner, means or instrument, and of all circumstances concerning it. And the Jury being charged shall stand together, and proclamation

shall be made for any person that can give evidence, to draw near, and that they shall be heard. And every Coroner is further empowered to send out his warrant for witnesses, commanding them to come before him, to be examined, and to declare their knowledge concerning the matter in question; and he shall administer an oath to them in form following:

You solemnly swear, that the evidence which you shall give to this inquest, concerning the death of A B here lying dead, shall be the truth, the whole truth, and nothing but the truth. So help you God.

The evidence of such witnesses shall be in writing subscribed by them; and if they relate to the trial of any person concerned in the death, then shall the Coroner bind such witnesses by recognisance in a reasonable sum for their personal* appearance at the next Supreme Judicial Court, to be holden within or for the same county, there to give evidence accordingly; and commit to the common gaol of the county such witness or witnesses as shall refuse to recognise as aforesaid; and shall return to the same Court the inquisition, written evidence and recognisance by him taken. And the Jury having viewed the body, heard the evidence, and made all the inquiry within their power, they shall draw up and deliver unto the Coroner their verdict upon the death under consideration, in writing under their hands and seals, in form following:

— m. An inquisition taken at B— within the said county of S— the — day of — in the year of our Lord — before W G, gentleman, one of the Coroners of the said county of S— upon the view of the body of A B there lying dead, by the oaths of — yeomen, good and lawful men, who being charged and sworn to inquire for the State, when, how and by what means the said A B came to his death, upon their oaths do say — [Then insert, how, when and by what means, with what instrument he was killed; and if it appears that he hath been murdered by a person known, then the inquisition shall be concluded in this form:] to wit, — And so the Jurors aforesaid upon their oaths aforesaid, do say, that the aforesaid A B in manner and form aforesaid, then and there of his malice aforethought, did kill and murder against the peace and dignity of the State, and the laws of the same, — [If it appears to be self-murder, then shall the inquisition be concluded thus:] And so the Jurors aforesaid, thus upon their oaths aforesaid, do say, that the said A B in manner and form aforesaid then and there voluntarily and feloniously as a felon of himself, did kill and murder himself against the peace. [And if it appears that the death was by misfortune] And so the Jurors aforesaid, upon their oaths say, that the said A B in manner aforesaid, came to his death by misfortune. [If innocently by the hands of any person.] The Jurors upon their oaths aforesaid do say, that the aforesaid D R, the aforesaid A B by misfortune, and against and contrary to the will of him the said D R in manner

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Coroner to summon witnesses and swear them, and take evidence in writing.

Form of oath.

May recognise witnesses, in case, &c.

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Jury to deliver verdict to Coroner.

Form of verdict, in divers cases.

§ 3. And it is further enacted, That the said Coroner and Jurors, the said inquisition taken under their hands and seals, the day and year aforesaid.

§ 4. And upon an inquisition found before any Coroner of the death of any person, by the felony or misfortune of another, he shall immediately inform one or more of the Justices of the peace residing nearest to the place, that the person killing, or being any way instrumental to the death, may be apprehended, examined and secured in order for trial.

§ 5. *Be it further enacted.* That every Coroner within the county for which he is appointed, shall, after the return of an inquisition of the Jury, upon the view of a dead body of any stranger, bury said body in a decent manner; and the expenses thereof, together with all the expenses of said inquisition and the Coroner's fees, shall be paid to said Coroner out of the Treasury of this State, an account of said expenses being first examined and allowed by the Legislature, in the same manner that accounts for State paupers are allowed: *Provided*, That the Coroners who shall return the inquisition, shall verify under oath, that the person found dead, was a stranger not belonging to this State, according to the best of his knowledge and belief; otherwise the expenses of taking up and burial, shall be paid to such Coroner, by the town where such dead body was found, and repaid to them by the town to which said stranger belonged, if an inhabitant of this State: and the expenses of said inquisition shall be paid to the Coroner, by the county in which the inquisition shall be taken.

Coroners may serve writs, &c. in cases where their own towns are parties or interested.

SECT. 4. *Be it further enacted,* That Coroners be, and they hereby are authorized and empowered to make service and return of all writs and processes to them duly directed, in which towns or plantations of which they are inhabitants, are parties or interested, any law, usage or custom to the contrary notwithstanding. [Approved March 19, 1821.]

Chapter 94.*

CH. 94.

AN ACT rendering valid the Doings and Acts of Coroners in certain cases.

[*414]

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That the acts and doings of all Coroners commissioned under the authority of the Commonwealth of Massachusetts, in office and qualified according to law on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and twenty, which were done and performed before the passing of this act, shall not be deemed void in law by reason of any of the provisions of an act, passed on said twenty-fourth day of June, entitled, "An Act providing that bonds shall be given by Sheriffs and Coroners to the Treasurer of this State, and giving remedies thereon." [Approved March 17, 1821.]

Proceedings of
all Coroners
confirmed.

Chapter 95.

AN ACT to exempt certain Goods and Chattels from attachment and execution,
and from distress for Taxes.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That the wearing apparel, beds, bedsteads, bedding and household utensils of any debtor necessary for himself, his wife and children ; the tools of any debtor necessary (a) for his trade or occupation ; the bibles and school books, which may be in actual use in his or her family ; all cast iron stoves and stoves made of sheet

Enumeration
of articles ex-
empted from
attachment,
execution and
distress.

[Mass. Stat.
Mar. 13, 1806,
§ 1.]

(a) 1. The term *necessary*, excludes from the exemption every thing, without which the debtor can work at his trade. *Buckingham vs. Billings*, 13 Mass. 86. For instance, printing types and forms are not exempted. *Danforth vs. Woodward*, 10 Pick. 423.

2. Implements of husbandry used in tilling land are not within the meaning of this act, and are not exempted from attachment. *Daily vs. May*, 5 Mass. 313.

3. Where the debtor himself worked in watches, and his apprentice or journeyman on jewelry, and the jury found the debtor's principal business was that of a jeweller, it was held that the tools used by the apprentice or journeyman were exempted. *Howard vs. Williams*, 2 Pick. 80.

CH. 95. iron, used exclusively for the purpose of warming buildings ; one cow, one swine (b), ten sheep, with the wool which may be shorn from them, and thirty hundred of hay for the use of said cow, and two tons for the use of said sheep, shall be exempted from attachment, execution and distress (c): *Provided*, That not more than one such stove to each building, owned or occupied by the same person or family shall be so exempted: *And provided also*, That the beds and bedding, exempted as aforesaid, shall not exceed one bed, bedstead and necessary bedding to two persons (d): nor the household furniture, the value of fifty dollars. [Approved January 23, 1821.]

(b) 1. A swine, though killed, is within the meaning of this provision, and so exempted from attachment. *Gibson vs. Jenny*, 15 Mass. 205.

2. By ch. 478, vol. 3, p. 327, it is provided, that one cow, and one heifer or calf, until such heifer or calf shall become three years old, or shall have had a calf; and two swine, one of which shall not exceed in weight 100 lbs. shall be exempt from attachment in such case. And when a debtor shall own a cow, and heifer more than three years old, or which has had a calf, or two swine each exceeding in weight 100 lbs. the debtor by himself or agent may elect either of the former and either of the latter to be exempt from attachment. By ch. 341, vol. 3, p. 187, all produce of farms while standing and growing, and until harvested, and corn and grain necessary for the sustenance of a debtor and his family, not exceeding thirty bushels, and all the debtor's interest in one pew in any meeting house where he and his family stately worship, are exempt from attachment. By ch. 394, vol. 3, p. 245, all potatoes raised or purchased by any person for the consumption of himself and family are so exempt. By ch. 513, vol. 3, p. 268, all firewood conveyed to any person's house for his family's use is so exempt.

(c) 1. Goods which cannot be returned in the same plight, as hides in vats for tanning, are not liable to attachment. *Bond vs. Ward*, 7 Mass. 123.

2. Hay in a barn is attachable on mesne process and subject to removal for safe keeping. *Campbell vs. Johnson & als.* 11 Mass. 184. See ch. 60, § 34, ante p. 355; also, above note, b, 2.

3. Private papers and account books are not goods attachable. *Oystead vs. Shead & al.* 12 Mass. 506.

(d) Two beds only are exempted, when the debtor's family consists of himself and wife, and three young sons. *Glidden vs. Smith*, 15 Mass. 170.

Chapter 96.*

CH. 96.

AN ACT for the further relief of poor Prisoners committed by Execution for debt.

[*415]

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That whenever any poor prisoner is or shall be committed by execution for debt in any of the prisons of this State, and the judgment creditor is or shall be dead, and two months shall have elapsed since the death of such judgment creditor, without any administration being granted upon his estate, the notice required by law in such case shall be served upon the attorney of record of such judgment creditor in the suit whereon the judgment was rendered, upon which the execution whereby such debtor stands so committed was issued ; and such notice being served upon such attorney in the same manner and within the same time as notice is to be served in other cases by law, shall be good and effectual to all intents and purposes, as the same would be if duly served upon the judgment creditor if living. [Approved June 27, 1820.]

If Judgment creditor is dead,

notice served on the attorney of record.

Chapter 97.

AN ACT to direct the Time and Manner of exhibiting the Accounts of County Treasurers, and the Estimates for County Taxes, and for other purposes.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That the respective Courts of Sessions in the several counties of this State, at the terms of the said Courts holden next before the first day of January annually, shall make up and prepare estimates of taxes for all county charges, equal at least to defray the expenses which have accrued or may probably accrue for one year ensuing the said first day of January, including the building and repairing of gaols and Court houses, and their appurtenances, with the debts due and owed by the said counties respectively ; and the said estimates being so made and approved by the said Courts, shall be recorded by the respective Clerks in a book for that purpose to be provided

Courts of Sessions to prepare estimates of county taxes,

[Mass. Stat. June 25, 1811, § 1.]

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to be transmitted to the Secretary of State before the first Monday of January annually.

and* kept ; and a fair copy of the said estimates shall be signed by the Chief Justice or senior Justice presiding in the said Courts, and attested by the Clerks thereof ; and the said Clerks respectively shall transmit the same to the office of the Secretary of State, on or before the first day of January annually, so that the said estimates may be laid before the Legislature for their approbation, at the session thereof which may be thereafter next holden.

County Treasurers to exhibit their account annually, with estimates, &c. and deliver them to the Clerks.

[Ib. § 2.]

Clerks to send them to Secretary of State, &c.

SECT. 2. *Be it further enacted*, That the Treasurers of the several counties, be, and they are hereby directed to prepare and exhibit their accounts as county Treasurers annually, (a) to the close of every year, to be accompanied with the estimates for county taxes, being first allowed and approved by the said Courts ; and it shall be the duty of the said Treasurers to deliver the said accounts to the said Clerks of the Courts aforesaid ; and it shall be the duty of the said Clerks to inclose and seal up the said Treasurer's accounts with the said estimate, and transmit them to the office of the Secretary of the State, that they may be examined and allowed by the Legislature, at the same time with the said estimates for county taxes.

Treasurers, &c. exhibit annually to Court of Sessions account of money, &c.

[†See ch. 464, § 4, vol. 3, p. 303.]

Authority of the Court.

SECT. 3. *Be it further enacted*, That it shall be the duty of the several county Treasurers,† county Attornies, Sheriffs, and all other persons holding money or effects belonging to their respective counties, annually, or oftener, if thereunto required, to exhibit an account of the same to the said Court of Sessions, at such times as they shall appoint : and the same courts are authorized to examine and adjust such accounts, and to make a reasonable allowance for all such services as are not provided for by law ; and on settlement to cause the balances which shall be found due to be paid into, or from, (as the case may be,) the several county Treasuries.

C. Courts of Com. Pleas to allow and order payment of accounts of

SECT. 4. *Be it further enacted*, That the several Circuit Courts of Common Pleas in this State, be, and they are hereby authorized and empowered to receive, examine, and

(a) By ch. 188, § 2, vol. 3, p. 8, County Treasurers are also required to publish annually, in January, a full and fair statement of the financial concerns of their respective counties.

allow the accounts, and order payment out of the Treasury of their respective counties, for services and expenses incident to said Courts, any law to the contrary notwithstanding. [Approved March 10, 1821.]

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incidental expenses in said Courts.

Chapter 98.*

[*417]

AN ACT concerning Registers of Deeds.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That there shall be chosen by ballot, in each county within this State, by such persons as are qualified to vote for Representatives, at the town and plantation meetings, on the second Monday of September, in the year of our Lord, one thousand eight hundred and twenty-one, and every five years thence following, some discreet and suitable person to be Register of Deeds. And the Selectmen of towns, and Assessors of plantations shall receive, sort and count the votes of the qualified electors present, and declare the same; and the town or plantation Clerk shall form a list of the persons voted for, with the number of votes for each person against his name, and having recorded the same, shall transmit a certified copy of the record to the Clerk of the Court of Sessions within the county, on or before the first day of the term of said Court next after the said month of September; and it shall be the duty of said Court, on the second day of said term to examine the certified copies of the records aforesaid, returned by the Clerks of the towns and plantations within their county; and the person having a majority of all the votes legally returned, shall be declared Register of Deeds, and shall hold his office for the term of five years, and until some other person shall be chosen and qualified to act in his place. And the said Register shall be sworn to the faithful discharge of the duties of his office, and shall give bond with sufficient sureties to the Treasurer of the county, in the sum of two thousand dollars for the faithful discharge of his trust: *Provided, That when-*

Register of deeds to be chosen by ballot in September, 1821, and once every 5 years afterwards.

Mode of election.

Register so chosen, to be sworn, and to give bond to county treasurer, or Clerk of Sessions.

CH. 98. ever the Register of Deeds shall be Treasurer of the county, such bond shall be given to the Clerk of the Court of Sessions.

When no choice is made by people, what proceedings are to be had at another trial.

[*418]

SECT. 2. *Be it further enacted*, That whenever it shall happen that no person shall have a majority of all the votes legally returned, for a Register of Deeds in any county within this State, it shall be the duty of the Court of Sessions to issue their warrants to the Selectmen of towns, and to the Assessors* of plantations, to call meetings of the qualified electors, to vote for a Register of Deeds; and the votes shall be received, sorted, counted and declared, and lists thereof recorded and certified to the Court of Sessions, in the manner prescribed in the first section of this act; which certified lists shall be returned to the Clerk of the Court of Sessions previous to the time to which said Court shall adjourn, for the purpose of examining the same.

Register of Deeds to receive 17 cents duty on all deeds, &c. for use of county.

SECT. 3. *Be it further enacted*, That every Register of Deeds in this State, for each deed or instrument made for the conveyance of land, or any title therein, brought to his office to be recorded, shall, before he record the same, demand and receive, of the person bringing the same, seventeen cents; and on or before the first day of April annually, shall account on oath for, and pay to the Treasurer of the same county, all the duties that shall be so received; and said Register shall be allowed for receiving and paying said duties, at the rate of two per cent. thereon.

When Register is found guilty of misconduct, &c. in office, his records to be delivered to Clerk of Supreme Judicial Court.

[Mass. Stat. Feb. 16, 1787, § 5.]

SECT. 4. *Be it further enacted*, That when any Register of Deeds, upon the presentment of the Grand Jury, or information of the Attorney General, in the Supreme Judicial Court, shall by confession, demurrer, verdict or default, after reasonable notice, be found guilty of misconduct or misbehaviour in his said office; or that by reason of infirmity of body or mind, he is incapable of discharging the duties thereof; the said Court shall enter up judgment thereon that the same Register be removed and displaced from the said office; and thereupon issue a writ to the Sheriff of the same county, to take the books and papers, to the said office belonging, and them deliver over to the Clerk of said Court, to be by him carefully kept, until a Register shall be duly chosen and qualified as the law directs.

SECT. 5. *Be it further enacted*, That upon the death, resignation, or removal of any Register of Deeds, two or more Justices of the Sessions, living in or near the shire town of the county, shall issue their warrants, directed to the Selectmen of the several towns, and assessors of plantations, within such county, directing them to convene the inhabitants of their respective towns and plantations, qualified as aforesaid, and to proceed to the choice of some person qualified* as aforesaid, to fill up the vacancy; and the said Justices shall make their warrants returnable to themselves at a day certain, and shall give notice to the other Justices of the Sessions of their proceedings therein, and request them to meet upon the day appointed for the return of the said warrants, at some certain place in the shire town; and the major part of the Justices of such Court, who shall meet at the time and place assigned as aforesaid, shall examine the returns made as before directed, and the person having the majority of votes, after being sworn, and giving bonds as aforesaid, shall be the Register of Deeds for such county, until the time appointed by this act for the election of Register of Deeds throughout the State.

CH. 98.

In case of death, resignation or removal of Register, what proceedings are to be had.

[Mass. Stat. Mar. 17, 1784, § 2.]

[*419]

SECT. 6. *Be it further enacted*, That whenever a vacancy† in the office of Register of Deeds in any county shall happen, the Clerk of the Supreme Judicial Court of such county, being first sworn to the faithful discharge of the trust, shall take into his custody the several books, wherein the deeds and conveyances of land are recorded, together with the deeds and other papers to the said office belonging. And the said Clerk shall receive all deeds and other papers brought to be recorded, during such vacancy, and he shall note thereon the time of their being received, and the record shall bear date accordingly; and such Clerk is also empowered during such vacancy, to make out attested copies of any such deeds and other papers and records to him committed as aforesaid; which copies shall be valid to all intents and purposes as though the same had been made out by any Register qualified as aforesaid; for which copies the said Clerk shall be allowed the same fees as is or may be provided for Registers in similar cases. And upon the appointment of a Register as

[†See additional act.]

In case of vacancy, Clerk of Supreme Judicial Court to be sworn—and take charge and perform certain duties of Register, during such vacancy.

CH. 99. aforesaid, he shall deliver up the said books, deeds and papers, into his hands. [Approved March 19, 1821.]

Additional Act, ch. 287, Vol. 3, p. 127.

[*420]

Chapter 99.*

AN ACT directing the time and manner of appointing County Treasurers, and for other purposes.

County Treasurer to be chosen annually on 2d Monday of September.

Mode of choosing.

[Mass. Stat. Mar. 23, 1796, § 1.]

Copy of record of votes to be sent under seal to next Court of Sessions.

{†Time of transmitting copy of record, modified; see ch. 230, vol. 3, p. 128 }

Person chosen to be sworn and give bond,

and to continue in office till

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That there shall be annually chosen in each county within this State, on the second Monday of September, by the written votes of such persons as are by the Constitution qualified to vote for Representatives in the several towns and plantations, a discreet suitable person, being a freeholder and resident in the same county, for a county Treasurer; the votes to be counted and sorted in the town or plantation meeting by the Selectmen or Assessors thereof, and town or plantation Clerk; the names of the persons voted for, and the number each person had, shall be recorded by the Clerk in the town or plantation book, and an attested copy of such record shall be transmitted under seal to the next† Court of Sessions to be held within and for the same county, on the first day of the Court's sitting; there to be opened and compared with the like returns from the several towns and plantations in such county: and the person having the majority of the said votes, and accepting of the said office, after being sworn to the faithful discharge of the trust before the said Court, or any two Justices, quorum unus, and giving bond (a) for the faithful discharge of the trust, with sufficient sureties, in such penal sum as the Court shall direct, to the Clerk of said Court for the same county, for the time being, and his successor in that office, shall continue in the said office for the term of one

(a) The bond in such case is intended to protect the public during the year for which the Treasurer was elected. *Bigelow vs. Bridge*, 8 Mass. 275.

year, and until some other person shall be chosen and qualified as aforesaid in his room. And in case upon comparing the votes returned as aforesaid, no person shall have a majority of the whole number of votes returned, or the person chosen shall decline accepting the office, or after accepting, shall die or resign, or remove out of the county within the year; then, and in such case, it shall be lawful for the Justices of the same Court to appoint, by ballot, a suitable person, being a freeholder in the same county, to that office; and the person thus appointed by the Court* of Sessions, and accepting the office, and being sworn to the faithful discharge of the trust, and giving bond as before directed, shall be Treasurer of said county for the remainder of the year, and until some other person shall be chosen and qualified in manner as aforesaid.

CH. 99.

another is chosen and qualified. In case of no choice what proceedings are to be had.

[*421]

SECT. 2. *Be it further enacted*, That all monies received by the county Treasurer, for the use of the county, shall be improved and employed by him for the defraying county charges, as the Court of Sessions, Circuit Court of Common Pleas, and the Supreme Judicial Court, shall, pursuant to law, from time to time, by their order in writing, direct and appoint; and each county Treasurer shall account with the Court of Sessions for the same county of which he is Treasurer, for all his receipts and payments; which Court shall make him such allowance for his executing the duties of his office as to them shall seem reasonable.

County Treasurer's duty as to paying county charges.

[Ib. § 2.]

SECT. 3. *Be it further enacted*, That each county Treasurer, respectively, be, and hereby is authorized and empowered to draw in and enforce the payment of all county rates and taxes, assessed agreeably to the directions of law, by the same rules and methods prescribed for the Treasurer of the State to gather in the rates and taxes assessed for the use of the State, and shall annually lay before the Legislature an account of all monies that shall have been raised in the county to which he belongs by assessments on the several towns and places therein, or by any other way or manner by him received as county Treasurer, and how the same have been disposed of; and no further assessments shall be made on the several towns and places in the county to which he belongs until

To enforce payment of county taxes, in same manner as State Treasurer.

[Ib. § 3.]

To lay an account annually before the Legislature, of monies raised, &c. and how disposed of.

CH. 100. the said account has been offered to the Legislature and allowed by them.

Persons not eligible to the office of county Treasurer.

SECT. 4. *Be it further enacted*, That from and after the passing of this act, no person shall be eligible as county Treasurer, who holds the office of Attorney General, or who is empowered to act as Attorney for the State within the county, nor any person holding the office of Justice of the Circuit Court of Common Pleas, Clerk of the said Court, or Sheriff.

[*422]
Costs paid to clerks to be paid to county Treasurer, who shall settle with State Treasurer, as in case of fines, penalties, &c.

[†Modified; see ch. 193, vol. 3, p. 7, & ch. 464, vol. 3, p. 306.]

SECT. 5. *Be it further enacted*, That in all civil actions, in which the State shall be a party, whether by scire facias,* or other suit or process, the costs which may be taxed in favour of the State, and which may be paid before any execution shall issue, shall be paid to the Clerk of the Court in which said suit shall be pending, and by him immediately paid over, without any deduction, to the Treasurer of the county,† who shall account for and settle the same with the State Treasurer, in the same manner as is provided by law for the settlement and adjustment of accounts by county Treasurers of fines, penalties, and forfeitures and costs in criminal prosecutions. [Approved March 15. 1821.]

Additional Act, ch. 289, Vol. 3, p. 128.

Chapter 100.

AN ACT respecting the Offices and Duties of the Attorney General and County Attornies.

County attornies to be appointed and sworn in same manner as Attorney General. Duty of county attornies.

[Mass. Stat. June 20, 1807, § 1.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That the Attornies for the State, in the several counties, shall be appointed, commissioned and sworn in the same manner as the Attorney General is ; and it shall be the duty of the said county Attornies, within their proper counties, to appear and act in behalf of the State, and of their said counties respectively, in all cases in which the State or county may be a party, in the Circuit Courts of Common Pleas and the Supreme Judicial Court ; in the absence of the Attorney General ; and in

such other prosecutions, in behalf of this State, as may be pointed out to them, by instructions from the Attorney General : *Provided*, That nothing herein contained shall be construed to excuse the Attorney General from attending to his official duties, as heretofore, in the Supreme Judicial Court. CH. 101.

SECT. 2. *Be it further enacted*, That no Attorney General or County Attorney, shall receive any fee or reward, ~~from or in behalf~~ of any prosecutor, for services in any prosecution to which it shall be his official duty to attend ; or during the pendency of such prosecution be concerned as counsel or attorney, for either party, in any civil action depending on the same facts. [Approved March 15, 1821.]

Attorney General and county Attorney to receive no fees from any prosecutor, or to counsel either party, in a civil action depending on the same facts. [Ib. § 2.]

Chapter 101.*

[*423]

AN ACT concerning Notaries Public.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That every Notary Public shall constantly keep a seal of office, whereon shall be engraven his name, and the words Notary Public, and Maine, together with the arms of the State or such other device as he may choose.

Notaries Public to have seal of office with device, &c. thereon.

SECT. 2. *Be it further enacted*, That it shall be the duty of each Notary Public, to note or enter of record, whenever requested, all losses or damages sustained or apprehended, by sea or land, and also all averages and such other matters as by mercantile usages, appertain to his office, and cause protest thereof to be duly and formally made. And all facts, extracts from documents and circumstances by him so noted, shall be sworn to, and subscribed by all the persons appearing to protest ; and the Notary Public shall note, extend, and record the protest of the persons so appearing and deposing ; and he shall grant authenticated copies thereof, under his signature and notarial seal, to all such as demand and pay for the same.

Duties of Notaries as to protests on marine losses, &c.

SECT. 3. *Be it further enacted*, That every Notary

CH. 101. Public, when a foreign or inland Bill of Exchange, not duly honored by the drawee, is committed to him shall on request, go in person with such bill to the drawee and demand of him, or at his usual abode, acceptance or payment thereof, (as the case may be,) and if he neglect or refuse to accept, or to pay the same, the said Notary Public shall note a protest thereof, and immediately enter of record a copy of said bill; and also the answer or reason given, why the drawee refuses to accept or pay the said bill, or his absence or silence, as the case may be, and on request, he shall, to any demandant, furnish a copy of his record, in due form of a protest, under his hand and notarial seal: and in like manner, all notices to endorers of promissory notes, and of the assignments thereof, and also of the assignments of all obligations, contracts or other writings obligatory signed, may be given, noted of record, protested and certified on request of the person interested.

—As to foreign or inland bills of exchange.

[See ante p. 488, ch. 88.]

Notices on promissory notes to endorers and others.

[*121] Notaries may take depositions in perpetuum and to be used out of the State.

—May grant warrants of survey on vessels, &c.

—To keep records of their acts, &c.

Records of Notary, on his decease or removal, to be deposited in the Clerk's office.

[Mass. Stat. Feb. 26, 1799, § 1.]

SECT. 4*. *Be it further enacted,* That every Notary Public, duly sworn, be and he hereby is fully authorized and empowered to take depositions in perpetual remembrance of the thing, and depositions to be used or sent out of this State, to grant warrants of survey on vessels damaged, and to certify country products; and in general to do and perform all acts and things usually done by Notaries Public (a).

SECT. 5. *Be it further enacted,* That it shall be the duty of every Notary public, to note and record at length, in a book of records kept for the purpose, all acts, protests, depositions, and other things by him noted, or done in his official capacity: and all copies or certificates by him granted, shall be under his hand and notarial seal.

SECT. 6. *Be it further enacted,* That on the death, resignation, or removal from office of any Notary Public within this State, the records of the said Notary Public, together with all the papers relating to the business of the office shall be deposited in the office of the Clerk of the Judicial Courts for the same county in which the said Notary Public resided,

(a) Notarial certificates relative to ships and vessels are never considered as evidence, except in contradiction to evidence given in regular form by the party making the protest. *Welsh vs. Barrett*, 15 Mass. 884.

and any Notary Public who, on his resignation, or removal from office, shall neglect to deposit such records and papers in the Clerk's office as aforesaid, for the space of three months, shall forfeit and pay a sum not less than fifty dollars, nor more than five hundred dollars. And if any executor or administrator of any deceased Notary Public, shall neglect to lodge said records or papers as aforesaid, which shall come into his hands, in the Clerk's office, for the space of three months after his acceptance of that trust, he shall forfeit and pay a sum not less than fifty dollars, nor more than five hundred dollars. And if any person shall knowingly destroy, deface, or conceal any records or papers of any Notary Public, he shall forfeit and pay a sum not less than two hundred dollars, nor more than one thousand dollars, and shall be moreover liable to an action for damages by the party injured.

CH. 102.

Penalty for neglect to deposit such records.

Penalty for destroying or injuring them.

SECT. 7. *Be it further enacted*, That it shall be the duty of the several Clerks of the Courts aforesaid, to receive and safe keep, all the records and papers directed by this act, to be deposited in their offices, and give attested copies of any of said records or papers, when required; for which service* each Clerk shall be allowed the same fees, as are or may be allowed by law to Notaries Public. And copies so given by the said Clerks, are hereby declared to be as valid as if the same had been given by the said Notaries. And all forfeitures under this act, shall be, one half to the State, the other half to him or them who shall sue for the same, to be recovered in an action of debt in the county where such Notary Public resided. [Approved March 17, 1821.]

Clerks to keep and certify copies of such records.

[Ib. § 2.]

[*425]

Forfeitures, how distributed.

Chapter 102.

AN ACT establishing the Duties to be paid by certain Officers therein named.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That every Sheriff, every Clerk of any Court of record, every county Attorney, every Judge of Probate, every Register of Probate, every Justice of the Peace, every Coroner, every Notary

Officers commissioned by Massachusetts.

CH. 102. Public, and every Inspector General, duly commissioned under the Government of the Commonwealth of Massachusetts, whether sworn to act as such or not, shall on or before the first day of February next take and subscribe the oaths required of like officers by the Constitution and Laws of this State, and each such Sheriff of the counties of York, Cumberland, Lincoln or Kennebec, shall pay fifty dollars, and of any other county twenty-five dollars, each such Clerk of the county of York, Cumberland, Lincoln or Kennebec, shall pay forty dollars, and of any other county twenty-five dollars, each county Attorney shall pay five dollars, each such Judge of Probate shall pay seven dollars, each such Register of Probate shall pay ten dollars, each such Justice of the Peace shall pay five dollars, each such Coroner shall pay three dollars, and each such Inspector General shall pay twenty dollars† to the Treasurer of his county; and if such Sheriff, Clerk, county Attorney, Judge of Probate, Register of Probate, Justice of the Peace, Coroner or Inspector General shall fail either to take such oath, or to pay the money hereby required, on or before the first day of February next, he shall be thereafterwards disqualified to act under the same commission* except to complete any business previously commenced under the authority of such commission.

to take and
subscribe
oaths,

and to pay du-
ties to county
Treasurer.

[†See ch. 417,
vol. 3, p. 264.]

Disqualified to
act on failure.

[*426]

Persons ap-
pointed under
this State to
pay duties.

[Duty required
of Coroner a-
bolished. See
ch. 332, vol. 3,
p. 177.]

Penalty of neg-
lect.

Duty of county
Treasurer.

SECT. 2. *Be it further enacted,* That every Sheriff, every Clerk of such Court, every county Attorney, every Judge of Probate, every Register of Probate, every Justice of the Peace, every Coroner, and every Inspector General, commissioned by the Government of this State, shall within sixty days, from and after his being qualified to act under such commission, pay into the Treasury of his county the sum respectively as is herein before required of like officers, and if any officer mentioned in this act shall fail to pay the sums herein required, he shall for each and every official act by him performed, forfeit and pay the sum of five dollars to be recovered by indictment to the use of the county where he resides, or by action of debt in any Court proper to try the same, to the use of the person who shall sue therefor.

SECT. 3. *Be it further enacted,* That it shall be the duty of the county Treasurer, at all times when he shall make

out his account current with the State for settlement to credit all sums he shall have received by virtue of this act, and the names of the men from whom he shall have received such money, subsequent to his closing his next preceding account. [Approved June 28, 1820.]

See next ch.; also ch. 286, vol. 3, p. 126.

Chapter 103.

AN ACT relating to the payment of Duties by Officers.

BE it enacted by the Senate and House of Representatives, in Legislature assembled, That the duties required by "An Act establishing the duties to be paid by certain officers therein named," may at the option of the person paying the duty, be paid to the Treasurer of the State, or to the Treasurer of the county, as in said act is directed. [Approved March 17, 1821.]

Chapter 104.*

[*427]

AN ACT directing before whom all Judicial and Civil Officers shall be qualified, where not otherwise provided for in the Constitution.

SECT. 1. **BE** it enacted by the Senate and House of Representatives in Legislature assembled, That the Justices of the Supreme Judicial Court, the Attorney General, Secretary, Treasurer, Adjutant General, and Quarter-Master General, shall take and subscribe the oath or affirmation required by the Constitution before the Governor and Council, when in session, and in their recess before any two members of the Council; and that every other person elected, appointed, or commissioned to any Judicial, Executive or Civil office, under this State, shall take and subscribe the same before any one of the Council, or before any one of the Magistrates commissioned by the Governor for that purpose, excepting in such cases where the Constitution† has otherwise provided.

Certain officers to be sworn before Governor and Council, or two of the Council.

Others before any one of the dedimus.

[†Const. art. 9, ante p. 39.]

CH. 105. *Repealing clause.* **SECT. 2.** *Be it further enacted,* That a law passed the thirteenth day of June last, directing before whom all Judicial, Civil and Military Officers shall be qualified, be, and the same is hereby repealed. [Approved February 10, 1821.]

Chapter 105.

AN ACT establishing and regulating the Fees of the several Officers and other persons therein mentioned.

[Mass. Stat.
Feb. 13, 1796,
June 21, 1798,
Feb. 26, 1799,
June 16, 1800,
June 23, 1802,
June 22, 1803,
June 22, 1804.]

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled,* That the fees of the several persons hereafter mentioned for the services respectively annexed to their names, shall be as follows, viz.

JUSTICES' FEES.

Justices' fees.

For every blank writ of attachment and summons thereon, or original summons—*seventeen cents.*

For the declaration in each writ of attachment and summons thereon, or original summons triable before a Justice—*forty cents.*

[*428]

Every* subpoena, for one or more witnesses—*ten cents.*

For the entry of an action, or filing a complaint in civil causes, including filing of papers, swearing witnesses, examining, allowing, and taxing the bill of costs and entering up the judgment and recording the same—*sixty-one cents.* The trial of an issue—*fifty cents.*

Copy of every original paper or record, if under a page—*ten cents;* if upwards of a page, at the rate of twelve cents per page.

Writ of execution—*twenty-five cents.*

A recognisance to prosecute an appeal, including principal and surety—*twenty cents.*

Taking affidavits out of Court to be used in the trial of any cause actually depending—*twenty cents;* for the Justices travel therefor both going out and returning home, at the rate of *fifty cents* for every ten miles; for writing the deposition, caption and notification, at the rate of *twelve cents* per page; and the Justice who shall take any deposition shall certify his own and the deponent's fees and officer's fees and nothing more.

Taking affidavits, in perpetual remembrance of the thing, to each Justice—*twenty cents;* and for his travel and the writing, the same as in the case last mentioned.

Administering an oath to persons appointed to appraise estates, or to appraise and divide real estates, together with certificates of the same—*twenty cents.*

Administering an oath to one or more witnesses at the same time, before referees or arbitrators—*twenty cents;* and for travel for that purpose, the same as in the case of taking affidavits.

Taking the acknowledgement of a deed with one or more seals, provided it be at one and at the same time, and certifying the same—*seventeen cents.*

Granting a warrant, swearing appraisers, relating to strays, and entering the same—*thirty-two cents.*

Administering oaths in all other cases with certificates, except oaths to town or parish officers—*twenty cents*.

CH. 105.

Receiving a complaint and issuing a warrant in criminal cases—*fifty cents*.

Entering* a complaint, in criminal prosecutions, swearing witnesses, rendering judgment and recording the same, examining, allowing, and taxing the costs and filing the papers—*seventy-five cents*.

[*429]

Recognising persons charged with crimes for their appearance at the Circuit Court of Common Pleas, or at the Supreme Judicial Court and for certifying and returning the same, with or without sureties—*twenty-five cents*, to be paid by the person so recognising.

For a mittimus for the commitment of any person on a criminal accusation—*twenty-five cents*.

Recognisance of debt and recording—*forty-two cents*; drawing rule and acknowledging the same—*thirty-three cents*.

Writ to remove a nuisance—*thirty-three cents*.

CORONER'S FEES.

Coroner's fees.

For serving a writ, summons or execution, and for collecting the monies due thereon, and for travel in returning precepts and inquisitions the same allowance, as is by this act allowed to Sheriffs for similar services.

For a bail bond—*twenty-five cents*; every trial where the Sheriff is concerned—*twenty-five cents*; and the same for attending the Jury therein.

Granting a warrant and taking an inquisition on a dead body—*one dollar*; if more than one at the same time, and who came to their death by the same means—*twenty cents* for each one after the first.

Travel and expense for taking an inquisition—*one dollar a day*, to each of the jurymen, for their travel, if above four miles out, *three cents* a mile each way; and for their services, *seventy-five cents* per day, including time and expenses; the Constable for his attendance and expenses in summoning a Jury, *ninety cents* a day. And all the aforesaid charges of the inquisition shall be paid out of the county Treasury.

FEES OF JUDGES OF PROBATE.

[Fees of Judges and Registers abolished by ch. 343, vol. 3, p. 183, except for extra copies of papers, at the rate of twelve cents a page.*]

Judge of Probate's fees.

[*430]

IN* THE CIRCUIT COURT OF COMMON PLEAS.

JUSTICES' FEES.

For the entry† of an action, including the taxing of the bill of costs—*eighty cents*.

[*431]
Fees of the Justices of the Circuit Court of Common Pleas.

[† See ch. 507, vol. 3, p. 355.]

And in every action where an issue in law or fact is joined, one dollar, in addition to the fee for entry: *Provided however*, That in every action pending in any Circuit Court of Common Pleas, within this State which shall be defaulted, without being submitted to a Jury or the writ read to them after an issue in fact be joined, the Justices of the said Court, the Clerk thereof, or the Attorney in such action shall receive or tax no other or greater fees, than they severally would have been entitled to receive and tax, had no such issue been joined.

Granting an appeal and taking a recognisance of the principal and surety or sureties—*twenty cents*.

CH. 105.



Proving a deed—*twenty cents*.

Surrender of a principal into Court by his bail—*twenty cents*.

Granting a writ of protection—*twenty-five cents*.

Entering a petition and making an order thereon for the sale or partition of real estate or for the location of public lots—*seventy cents*.

Accepting partition of real estate, or location on public lots—*forty cents*.

[*432]

Accepting* a report of referees, where the acceptance thereof is contested, *sixty cents*; otherwise—*thirty cents*.

Fees of the
Clerk of C. C.
C. Pleas.

[† Modified,
see ch. 507,
vol. 3, p. 353.]

FEES OF THE CLERK OF THE CIRCUIT COURT OF COMMON PLEAS.

For the entry† of every action, entering up and recording the judgment whether on a verdict, demurrer, nonsuit or default—*one dollar and twenty cents*, of which sum the Clerk shall pay into the Treasury of his county *forty cents*, on or before the first day of January annually.

Acknowledging satisfaction of a judgment on the record—*eight cents*.

Entering an appeal, and recognising principal and sureties—*fifteen cents*.

Copies *twelve cents* a page. And in all actions appealed, the original depositions and other papers except the writ and officer's return thereon shall, after being certified by the Justice or Clerk, be carried up without leaving copies in the Court below. Continuing each cause to the next term—*twelve cents*.

Entering the surrender of a principal into Court, and making a record thereof—*fifteen cents*.

For entering a petition and order thereon for the partition or sale of real estate or location of public lots—*twenty cents*; and for recording such petition and order at the rate of *twelve cents* a page.

Entry of a rule of Court upon the parties' submitting a cause to referees—*fifteen cents*.

Proving a deed in Court, and certifying the same—*twenty cents*.

Every blank writ of attachment, with a summons thereon—*fifteen cents*.

Every blank writ of scire facias or original summons—*fifteen cents*.

An original or alias writ of execution in personal matters, and filing the same when returned—*twenty-five cents*.

A writ of possession in real actions—*forty cents*.

A writ of protection or habens corpus—*twenty-five cents*.

A subpoena for one or more witnesses—*ten cents*.

A duces tecum—*twenty-five cents*.

Each venire facias, for jurymen to be paid out of the county Treasury—*five cents*.

Opening and filing a deposition—*eight cents*.

[*433]

Entering an indictment, presentment, complaint or information,* including the recording of the judgment of the Court therein, examining and casting the bill of costs and filing the papers—*sixty-five cents*.

Discharging a recognisance—*ten cents*.

Each warrant for a criminal—*twenty cents*.

Examining and casting the Grand Jurors account yearly, and order thereon—*thirty cents*.

Fees of the
Clerk of the
Court of Ses-
sions.

FEES OF THE CLERK OF THE COURT OF SESSIONS.

Each recognisance for an inn holder or retailer including principal and sureties and for transmitting the name of the licensed person to the Selectmen, and recording the licence—*fifteen cents*.

A warrant for county tax—*twenty cents*.

Warrant to lay out or alter a road—*twenty cents*.

Examining any account—*eight cents*.

Recording the reports of highways and other matters by order of the Court— **CH. 105.**
twelve cents a page.

Copies of all papers or records—*twelve cents* a page.

Keeping an account of the attendance of the Justices of the Court of Sessions, each term, to be paid out of the county Treasury—*seventy-five cents*.

For the entry of a petition—*fifty cents*.

IN THE SUPREME JUDICIAL COURT, JUSTICES' FEES.

Entering† an action or complaint, including the taxing of a bill of cost—*two dollars and twenty cents*.

[† Modified ;
see ch. 507,
vol. 3, p. 355.]

Allowing a writ of error, granting certiorari, habeas corpus, or other writ, on motion—*forty cents*.

Granting a writ of protection—*thirty cents*.

Proving a deed—*twenty cents*.

Entering a petition, and making order thereon for the sale or partition of real estate—*one dollar*.

Accepting a partition of real estate—*forty cents*.

The foregoing fees shall be received by the Clerk, and by him paid to the Treasurer of the State annually on or before the first day of January.

FEES OF THE CLERK IN THE SUPREME JUDICIAL COURT.

For the entry of an action or complaint, entering up and recording the judgment, whether on a verdict, demurrer, nonsuit,* default, or state of facts—*one dollar and fifty-five cents*. Fees of Clerk of S. J. Court. [*434]

A writ of review—*seventy cents*.

A writ of scire facias—*forty cents*.

An original writ of execution, including the taxing of the costs, and filing of the papers—*sixty-five cents*.

An original writ of habere facias possessionem, including the taxing of the costs, and filing of the papers—*eighty cents*.

An alias writ of execution—*thirty-five cents*.

An alias writ of facias habere possessionem—*fifty cents*.

A writ of habeas corpus—*forty cents*.

Copies of all papers containing less than one page—*ten cents each*; of all papers containing more than a page, at the rate of *twelve cents* a page.

Entering a rule of Court—*fifteen cents*.

Acknowledging satisfaction of a judgment, on record, *twelve cents*.

Continuing each cause and entering the same next term—*twenty cents*.

Proving a deed in Court and certifying the same—*twenty cents*.

For each venire facias for Jurymen to be paid out of the county Treasuries respectively, on the Justices' certificate—*six cents*.

Every writ and seal, other than before mentioned—*forty cents*.

Every subpoena, for one or more witnesses—*ten cents*.

Each recognisance including principal and sureties—*twenty cents*.

Recording judgment in every criminal cause—*forty cents*.

A writ of protection—*twenty cents*.

Entering a discharge of a recognisance by proclamation—*fifteen cents*.

For opening and filing a deposition—*ten cents*.

ALLOWANCE TO PARTIES AND WITNESSES.

To parties recovering costs for an Attorney in all causes where an issue in law or fact is joined in the Supreme Judicial Court—*two dollars and fifty cents*. Allowance to Parties and Witnesses.

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And in all causes in the Circuit Court of Common Pleas where an issue in law or fact is joined—*one dollar and fifty cents.*

For* the declaration in each writ—*fifty cents.*

For parties recovering costs, whether in the Supreme Judicial Court, Circuit Court of Common Pleas, Court of Sessions or before a Justice of the Peace—*thirty-three cents* for each day's attendance, and travel ten miles to be accounted as one day.

Power of attorney—*fifty cents,*

[No attorney
for to be taxed
in suit before
Justice. See
ch. 207, vol. 3,
p. 25.]

And no plaintiff shall be allowed for more than three day's attendance when the defendant is defaulted, unless the defendant appears in Court and makes answer to the plaintiff's suit; in which case if the defendant is defaulted after the expiration of three days, no attendance shall be taxed for the plaintiff, after the day when the default shall happen: *Provided nevertheless,* That when the party recovering costs in any Court shall live more than forty miles from the place of holding such Court, and such party shall not actually travel to attend the same Court, in such cause, there shall not be allowed for travel in taxing the bill of costs, more than forty miles distance, unless such party shall employ some agent or attorney, who shall in fact travel more than forty miles for the special purpose of attending such Court in such cause.

In a criminal cause, where one or more defendants are tried by the Jury at the same time in the Supreme Judicial Court, or where the cause is determined by an issue in law, for the Attorney General, or person attending for the State, *two dollars and fifty cents;* and if there be no trial by the Jury, and the cause be not determined by an issue in law, *one dollar and twenty-five cents;* and in all causes in the Circuit Court of Common Pleas, *one dollar and twenty-five cents.* Drawing an indictment in the Supreme Judicial Court, *one dollar and twenty-five cents;* and in the Circuit Court of Common Pleas, *sixty-five cents.* But no fees for travel shall be allowed and taxed in any bill of costs in any suit in which the State shall be party.

[Fees for complainant, not to be taxed. See ch. 235, vol. 3, p. 61.]

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Witnesses in civil or criminal causes whether in the Supreme Judicial Court, Circuit Court of Common Pleas or Court of Sessions, *one dollar* for each day's attendance, and *four cents* for each mile's travel going out and returning home: and before a Justice of the Peace, referees or arbitrators, *thirty-three cents* per day, and for their travel the same* as at other Courts: *Provided,* Such witnesses do personally attend said Courts respectively and certify in writing their attendance and travel.

Sheriffs', Constables' and Criers' fees.

SHERIFFS', CONSTABLES', AND CRIERS' FEES.

For the service of an original summons or scire facias, either by reading the same, or by copy on one defendant, *thirty cents;*† if on more than one defendant then for each other defendant so served, *thirty cents.*†

[† Fees modified; see ch. 445, vol. 3, p. 257.]

For the service of a capias† or attachment on one defendant with summons, *thirty cents:* if served on more than one defendant then *thirty cents* for each defendant so served. And if the officer, by the written direction of the plaintiff or plaintiffs, his or their agent or attorney shall make a special service of any such writ, either

by attaching property, or taking the body therefor, for such special service on each defendant on whom such writ shall be so served, the Sheriff shall be allowed *fifty cents* (a). And where the officer is by law directed to leave a copy in order to complete the service or shall give a copy of any precept upon demand thereof, he may charge at the rate of *twelve cents* a page.

For a bail bond, and writing the same, including principal and sureties, to be paid by the person admitted to bail, and taxed for him if he shall prevail, *twenty cents*.

Serving a writ of possession exclusive of fees for collecting on the costs, *one dollar and ten cents*; if on more than one piece of land *seventy-five cents* for each piece of land after the first.

The fees for collecting the costs on a writ of possession the same as on executions in personal actions.

Serving a warrant—*thirty cents* †

Sheriff's aid in criminal cases to each person for every twelve hours attendance including expenses, *one dollar*, and so in proportion for a greater or less time; and *four cents* for each mile's travel going out and returning home.

Summoning witnesses in criminal cases, *ten cents* for each witness, and travel as in civil causes, unless in special cases, when the Court may increase the fees to what they may judge reasonable.

For the Sheriff's or Constable's attending the Court, and keeping the prisoner in criminal cases, *seventy five cents* for every* twelve hours; and so in proportion for a greater or less time.

Levying (b) executions in personal actions for the first one hundred dollars, *four cents*; † for every dollar above that, and not exceeding two hundred dollars, *two cents* for every dollar; and for all above two hundred dollars, *one cent* for every dollar; travel for the services of such execution, and also of mesne process or warrant to him directed, *four cents* a mile, the travel to be computed from the place of service to the Court or place of return by the usual way; only one travel shall be allowed for one writ, execution or warrant, and if the same be served on more than one person, then the travel shall be computed from that place of service which may be most remote from the place of return, with all further necessary travel in serving such execution writ or warrant: but if the travel from the place of service to the place of return be more than fifty miles then only one cent a mile shall be allowed for all travel exceeding that distance. The travelling fees and fees of service shall be endorsed by the officer serving the same, otherwise they shall not be allowed.

Serving an execution upon a judgment of Court for partition of real estate, or assigning of dower, *one dollar* a day, and *four cents* a mile, out from the place of his abode. And no Sheriff shall demand or receive from any of his deputies more than at the rate of *twenty-five per cent.* on the amount of fees for travel and service (c).

[†Fees modified; see ch. 445, vol. 3, p. 237.]

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[†See ch. 309, vol. 3, p. 162, and see ch. 445, vol. 3, p. 237.]

[†Diminished by ch. 445, § 2, vol. 3, p. 239.]

(a) When the officer attached several distinct parcels of land, on a process wherein one defendant only was charged, and taxed a separate fee for each parcel so attached, the Court directed the Clerk to strike out all but one service fee of fifty cents. *Washington Bank vs. Bos. Glass Manufactory*, 6 Pick. 375.

(b) When a Sheriff has arrested a debtor on execution, and committed him to prison, and the debtor afterwards takes the benefit of the poor prisoner's act, the Sheriff is entitled to demand and receive his fees for poundage and travel, of the judgment creditor. *Boswell vs. Dingley*, 4 Mass. 411.

(c) A bond from a deputy Sheriff to the Sheriff, conditioned to pay the

CH. 105.

For returning the certificates of votes of the several towns for a Governor and Senators to the Secretary's office, *eight cents* a mile computing from the place of his abode to the Secretary's office, to be paid out of the Treasury of the State; and but one travel shall be allowed for the whole.

To the officer attending the Grand Jury, for each day's attendance, *seventy-five cents*.

The officer attending the Traverse Jury for every cause to be paid with the Jury fees—*twenty-five cents*.

For dispersing venires for Jurymen, Treasurer's warrants and proclamations of all kinds—*eight cents* each.

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To each appraiser of real estate for extending execution or* assigning dower, *one dollar* a day, and travel at the rate of *four cents* a mile going out and returning home.

For every deputy Sheriff or Constable who shall attend the Supreme Judicial Court or Court of Sessions, or Circuit Court of Common Pleas by their order, *one dollar* and *fifty cents* a day, to be paid out of the county Treasury.

[Part in italics modified; See ch. 408, vol. 3, p. 257.]

To the Sheriff for each day's attendance in the *Supreme Judicial Court or Circuit Court of Common Pleas*, *five dollars*; and *two dollars* per day for attending the Court of Sessions, and at the rate of *two dollars* for every ten miles travel from his place of residence to the Court.

TO THE CRIER.†

[†Office abolished by act Feb. 21, 1832, ch. 15.]

Three dollars per day, to be paid out of the county Treasury: *Provided*, The Crier shall not have any allowance for attending the Court of Sessions.

TO CONSTABLES.

[†Modified; see ch. 507, § 2, vol. 3, p. 356.]
Gauler's fees.

For the service of venires, *twenty-five cents*,† and *four cents* a mile for travel to the Clerk's office, to be paid out of the county Treasury.

GAOLER'S FEES.

Turning the key for each prisoner, committed or discharged—*twenty cents*.

Dieting each prisoner, such sum weekly as the Court of Sessions shall, from time to time, judge reasonable.

FOR MARRIAGES.

Town Clerk.

To the Town Clerk for publishing the bands of Matrimony, recording the same, giving a certificate of the publishment, and recording the marriage upon receiving the Justices' or Ministers' certificate thereof—*fifty cents*; to be paid by the man published, on receiving a certificate of the publishment:

To every Minister or Justice of the Peace who shall lawfully solemnize a marriage and certify the same—*one dollar* and *twenty-five cents*.

To the Town Clerk for recording births and deaths—*eight cents* each. For a certificate of a birth or death—*ten cents*.

Secretary of State.

FEES IN THE SECRETARY'S OFFICE.

For a certificate under the seal of the State, for the benefit of particular persons—*one dollar*.

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For* all copies for the benefit of particular persons, at the rate of *twelve cents* a page.

And it is to be understood that a page, as mentioned in this act, should contain two hundred and twenty-four words.

Register of Deeds fees.

COUNTY REGISTER'S FEES.

For entering and recording a deed or other paper of the length of one page or under, *twelve cents*.

Sheriff one third part of the legal fees on all writs and executions that should come to the hands of the deputy, is void by this provision. *Farrar vs. Barton & al.* 5 Mass. 395. See *Mattoon vs. Kidd & al.* 7 Mass. 83.

And for certifying on the original the time when, and the book and page where the same may be recorded—*five cents*.

If the instrument recorded exceed the length of a page, at the rate of *fourteen cents* a page.

The fees to be paid at the offering of the instrument.

For all copies at the rate of *fourteen cents* a page.

For entering in the margin a discharge of a mortgage, to be signed by the person discharging the same—*twelve cents*.

ALLOWANCE TO JURORS.

CH. 105.

Allowance to Jurors.

SECT. 2. *Be it further enacted*, That the Grand Jurors attending at the Supreme Judicial Court and Circuit Court of Common Pleas, and the Jurors for trials attending either of said Courts, shall each be allowed, *one dollar and twenty-five cents*† a day for their attendance, and *six cents* a mile for their travel out and home, to be paid out of the county Treasury; and there shall be paid to the Clerk of the Supreme Judicial Court, and to the Clerk of the Circuit Court of Common Pleas, respectively, by the Plaintiff, or appellant, the sum of *seven dollars* for the trial of each civil action, for the use of the county; and the said Clerks respectively shall forthwith pay over the same to the county Treasurer.

[† Increased to \$1.50 by ch. 363, vol. 3, p. 213. See ante p. 474, § 19.]

SECT. 3. *Be it further enacted*, That the Clerks of the several Courts and other persons keeping public offices shall constantly have a list of the fees by this act prescribed so far as it relates to them respectively, printed or wrote out in legible characters and hung in some convenient and conspicuous place in their respective offices. *And the Register of Probate shall put and keep up in some conspicuous part of the room, a list of fees† for Judge and Register, in every other place besides his office as aforesaid where a Probate Court may be holden, during the holding of the said Court in such place.*

Clerks of Court to have list of fees hung up in their offices.

[Mass. Stnt. Feb. 13, 1796, § 4.]

Register of Probate to keep list of his fees in his office.

[† Abolished; see ante, p. 521.]

SECT. 4*. *Be it further enacted*, That every officer or other person upon receiving any such fees as are stated in this act shall, if required by the person paying the same, make out a particular account of such fees, in writing, specifying for what they accrued upon pain of forfeiting to the party paying such fees, treble the sum by him or them so paid, to be recovered with costs by an action of debt, in any Court proper to try the same.

[*440] Officers, if required, must give an account in writing of fees by them received.

[Ib. § 5.]

SECT. 5. *Be it further enacted*, That if any person

CH. 105. shall wilfully and corruptly demand and receive any greater (*d*) fee or fees for any of the services aforesaid, than are by this act allowed and provided, or if any witness shall falsely, wilfully and corruptly certify (*e*) that he has travelled a greater number of miles, or attended a greater number of days than he has actually travelled or attended, he shall forfeit and pay, not less than five dollars, nor more than thirty dollars for every offence, to be recovered with costs, either by presentment in the Supreme Judicial Court or Circuit Court of Common Pleas, in which case the forfeiture shall accrue to the State ; or by action of debt (*f*) in any court of com-

Penalty for wilfully and corruptly demanding and receiving unlawful fees, or for witnesses falsely certifying, &c.

Mode of recovery.

[Ch. § 6.]

(*d*) 1. Receiving a negotiable promissory note by an officer for fees not due, will not support an indictment for extortion. *Com. vs. Cony*, 2 Mass. 523.

2. The penalty of this provision is not incurred where the fees are demanded of, or voluntarily paid by, a person not liable to the officer therefor. *Dunlap vs. Curtis*, 10 Mass. 210.

3. In an action under this provision, it is no defence that many other officers in the same county habitually receive greater fees, than those which the defendant had received. *Lincoln vs. Shatt*, 17 Mass. 410. See *onward*, 7.

4. In such case a declaration that shows the sum received as fees and the sum levied, without setting forth the whole transaction, is sufficient after verdict. *Livermore vs. Boswell*, 4 Mass. 437.

5. Where an officer, in settling an execution, demanded and received of the debtor a sum beyond the amount of his legal fees as compensation for trouble he had had at a former time from the debtor's resisting the officer, for which he had been indicted and convicted ; it was held not to be extortion, within this provision of the Statute. *Runnells vs. Fletcher*, 15 Mass. 525.

6. An officer does not incur the penalty herein provided, by taking fees on an execution on which he makes no service. But the penalty is incurred if he takes, as a compensation for extra trouble, greater fees for levying an execution than are allowed by the statute. *Shattuck vs. Woods*, 1 Pick. 171.

7. In an action on the statute, evidence of a usage to take such extra fees, is inadmissible. *Ib.* But see *Com. vs. Shed*, 1 Mass. 229. See above, 3.

(*e*) The certificate of a witness is usually conclusive on the Court in taxing costs for his trouble and attendance ; and if the certificate be false, the remedy for the party injured is by action ; but if the certificate itself appear suspicious, the Court will require an affidavit of the witness in explanation. *Cook vs. Holmes*, 1 Mass. 295.

(*f*) In an action of debt for a penalty, *nil debet* is the most proper plea. *Stilson vs. Tobey*, 2 Mass. 521.

petent jurisdiction ; in which case the forfeiture shall be for the use of any person who may sue for the same : But no such presentment or action shall be sustained, unless made or commenced within one year next after the time when the offence may be committed, and all persons who are or shall be entitled by any law or resolve, to an annual salary, and who also receive fees of office, for which they are required to be accountable, shall render to the Treasurer a quarterly account under oath of all fees of office by them received, which oath the Treasurer is hereby authorized to administer. And no person shall be permitted to receive his quarterly salary from the Treasury, until such account of the fees of office has been rendered : *Provided however*, That this act shall not be considered as extending to the Justices of the Supreme Judicial Court.

CH. 106.

Limitation.

Certain of-
ficers to render
quarterly ac-
count of fees to
Treasurer.

Salary of such
officer not to
be paid till
such account is
rendered.

SECT. 6. *Be it further enacted*, That all officers and persons, entitled to fees under any act in force in this State, who are not particularly provided for in this act, shall be entitled to, and receive for their services the same compensation, which they have heretofore received for like services, under* the laws which were in force prior to the first day of March instant : *Provided*, That the Inspector General of butter and of lard shall not demand or receive from any of his or their deputies more than at the rate of twenty-five per cent. on the amount of fees prescribed for the several services and duties, by them respectively performed ; *And further provided*, That this act shall not take effect, till after the last day of May next. [Approved March 20, 1821.]

Former com-
pensation in
certain cases
continued.

[*441]

Inspector
General of but-
ter and lard's
fees.


[Diminished ;
see ch 203, §
3, vol. 3, p. 26]

Additional Act, ch. 207, vol. 3, p. 25.

Chapter 106.

AN ACT establishing the salary of certain Officers.

SECT. 1. **BE** it enacted by the Senate and House of Representatives, in Legislature assembled, That the sum of fifteen hundred dollars shall be allowed and paid to the Gov-

CH. 107.  ernor annually out of the Treasury of this State ; that the sum of eighteen hundred dollars shall be allowed and paid to the Chief Justice of the Supreme Judicial Court, and the sum of fifteen hundred dollars to each of the other Justices of said Court ; that the sum of eight hundred dollars shall be allowed and paid to the Attorney General† ; and to the Treasurer, the sum of nine hundred dollars ; to the Secretary of State‡ and Adjutant General each, the sum of seven hundred dollars ; which said sums shall be paid to said officers respectively, in quarterly payments.

[†Increased;
see ch. 205,
vol. 3, p. 25.]

[‡Increased;
see ch. 274,
vol. 3, p. 101.]

SECT. 2. *Be it further enacted*, That the Attorney General and the Secretary of State shall annually account with the Treasurer of this State for all fees which they shall receive in their respective offices. [Approved June 19, 1820.]

Chapter 107.

AN ACT establishing the Salaries of the Judges of Probate.

SECT. 1. **BE** *it enacted by the Senate and House of Representatives, in Legislature assembled, &c.*

[*442]

[SECT. 1, repealed by ch. 343, § 1, vol. 3, p. 188.*

It prescribed the salaries of the Judges of Probate in the several counties.

SECT. 2, repealed by same ch. § 2.

It directed the Registers of Probate to keep an account of the fees received by the Judges of Probate, and pay quarter yearly to the county Treasurers the sums received by them.]

Repeal.

SECT. 3. *Be it further enacted*, That all laws now in force inconsistent with the provisions of this act, be, and they are hereby repealed. [Approved March 19, 1821.]

Additional Act, ch. 267, vol. 3, p. 94.

Chapter 108.

AN ACT for the safe keeping of the Records of the several Courts of Justice.

Registers of
Probate to
give bond to

SECT. 1. **BE** *it enacted by the Senate and House of Representatives, in Legislature assembled*, That the Registers

of the several Probate Courts, that may hereafter be appointed to that office, shall, before they enter upon the duties of their said respective offices, severally give bond to the Treasurer of the county to which they severally belong, in a sum not less than one hundred or more than one thousand dollars, at the discretion of the Court to which they officiate, with one or more sufficient sureties for the faithful discharge of their trust ; and for keeping up seasonably and in good order the records* of the same Court ; and also to make and keep convenient and correct alphabets of the records of which they shall respectively be appointed officers and keepers.

SECT. 2. *Be it further enacted*, That any Clerk of the Judicial Courts or Register of Probate, who after giving bond as by law, and in the preceding section required, shall incur a forfeiture thereof, shall be and hereby is declared incapable of sustaining or holding the said office ; and if either of the said Clerks or Registers shall have neglected to complete his records for more than six months, at any one time (sickness or any extraordinary casualty excepted) such neglect shall be adjudged a forfeiture of the bond of such Clerk or Register.

SECT. 3. *Be it further enacted*, That the Justices and Judges of the said several Courts are hereby required and directed to inspect (a) the conduct of their several Clerks and Registers, with respect to the records aforesaid ; and upon a deficiency therein, such Judge and Justices shall give information thereof, in writing to the Treasurer who has the delinquent's bond in keeping ; which Treasurer shall forthwith put the same in suit ; and the money recovered on such suit shall be applied for bringing up the deficient records, under the direction of the respective Judge or Judges of the Court where such deficiency shall happen ; and if there be a surplusage from the bond of a Register of Probate after making up the records, the same shall enure to the use of the county whereof the plaintiff is Treasurer ; and if there be a surplusage on such bond of the Clerk of the Judicial Courts, such surplusage shall enure to the use of the State ; and if the penalty of the bond incurred shall be insufficient to make

CH. 108.

the county
Treasurer.

[Mass. Stat.
Feb. 16, 1787,
§ 2.]

Condition of
such bond.

[*443]

Effect of the
forfeiture of
Register's or
Clerk's bond.

[Ib. § 3.]

What neglect
shall be ad-
judged a for-
feiture.

Justices and
Judges to in-
spect their
records, &c.
and upon de-
ficiency found
—to direct
Treasurer to
put delin-
quent's bond in
suit.

[Ib. § 4.]

Proceedings
therein.

If penalty of
bond be insuffi-
cient, Clerk or
Register's es-
tate liable to
make up re-
ords.

(a) See further provision, ch. 343, § 6, vol. 3, p. 189.

or stone, where the same has not already been done, for the safe keeping of the records, files, papers and documents, which now remain, or shall hereafter accumulate in the offices of the Register of Deeds, Register of Probate and Clerk of the Judicial Courts of this State ; which building or buildings shall contain separate fire-proof rooms for said offices with suitable alcoves, cases and boxes for preserving the said records, files, papers and documents.

CH. 110.

SECT. 2. *Be it further enacted*, That the Records in the offices aforesaid, shall hereafter be made and entered on paper of a firm texture, well glazed and finished, the principal ingredient of which shall be linen. [Approved January 27, 1821.]

Records to be made on linen paper, &c.

Chapter 110.*

[*445]

AN ACT providing and regulating Prisons.

SECT. 1. **BE** *it enacted by the Senate and House of Representatives in Legislature assembled*, That the Justices of the Court of Sessions shall, from time to time, assess the polls and estates within their several counties, in such sums as may be necessary to erect and keep in repair a good and sufficient gaol in each town where a Court by law is to be holden ; and to direct and order the building and repairing such gaols, according to their discretion. And in the prisons within the several counties of this State, there shall be provided by the Justices of the Court of Sessions, and at the expense of each county, respectively, sufficient and convenient apartments for receiving and lodging prisoners for debt, separate and distinct from felons and other criminals ; and it shall be the duty of the said Justices, at the beginning of every session, to inquire into the state of the prisons in their respective counties, with respect to the security of such prisons from escape, the condition and accommodation of the prisoners ; and shall, from time to time, take such measures as may best tend to secure them from escape, sickness and infection ; *Provided nevertheless*, That the Courts of Ses-

Court of Sessions in each county to raise money for building and repairing prisons [Mass. Stat. Feb. 21, 1785, § 1 and 8.] and cause them to be built and repaired.

Apartment to be furnished for debtors separate from felons and other criminals.

Court at every session to inquire as to the state of prison, &c. and prisoners.

Assessments to

who shall be committed during the sitting of either of the said Courts, with the cause of their commitment, that the Justices of the same Courts respectively may take cognisance thereof, and as well for the State, as the parties, may proceed to make deliverance of such prisoners according to law, for the crimes proper to the jurisdiction of the same Courts respectively; and also shall have the said calendar or register of prisoners ready to be inspected by the said Courts; and if any gaoler shall make default herein, he shall be fined at the discretion of the Court.

CH. 110.

Penalty for neglect.

SECT. 5. *Be it further enacted*, That no person, imprisoned upon mesne process, shall be held in prison, upon such process, above the space of thirty days next after the entering up final judgment upon the writ whereby he is committed, unless he shall be continued there, by having his body taken in execution, nor shall the prison keeper discharge* any such prisoner, unless judgment is given in his favor, until thirty days next after the said judgment is entered up, unless the party at whose suit he was committed, shall give order in writing for his discharge, and shall pay the legal fees of the gaoler.

Prisoners committed on mesne process to be detained but 30 days after judgment, unless taken in execution,
[Mass. Stat. Oct. 30, 1784, § 10.]

[*447] and not to be discharged within 30 days unless by order in writing.

SECT. 6. *Be it further enacted*, That it shall be the duty of the Sheriffs of the several counties within this State, to see that the gaols in their respective counties are kept in as cleanly and healthy condition as may be, and cause the walls thereof to be whitewashed with lime in April or May in every year, and as often as the Court of Sessions shall order the same, at the expense of the county; they shall also see that strict attention is paid to the personal cleanliness of the prisoners as far as may be.

Sheriff to cause prisons to be cleanly and whitewashed annually in April or May, or oftener if, &c.

[Mass. Stat. Feb 20, 1818, § 1.]

SECT. 7. *Be it further enacted*, That it shall be the duty of every gaoler or prison keeper to keep prisoners, committed for debt, separate and apart from felons, convicts, and prisoners committed upon charge of felony or other infamous crimes. And he shall also keep all minors who are committed to prison upon conviction or charge of any crime, and all prisoners in his custody upon a first conviction or charge of any crime, as separate and distinct from those who are notorious offenders, or who have been convicted more

Sheriff to keep debtors separate from convicts, &c.

and minors, &c. separate from notorious offenders, &c.

[Ib. § 2.]

CH. 110.

Prisoners committed for crimes, &c. not to be allowed spiritous liquors,

[Ib. § 3.]

unless in case of sickness,

nor prisoners committed for debt, if they apply to overseers for relief.

[*448]

Penalty for violation and mode of recovery.

[Mass. Stat. Feb. 24, 1818, § 4.]

Penalty for violating seventh and eighth sections of this act.

[Mass. Stat. Feb. 20, 1818, § 4.]

than once of any felony, or other infamous crime, as the construction and state of their respective prisons will admit.

SECT. 8. *Be it further enacted*, That no prisoner who is confined in any gaol within this State, either upon conviction and sentence for any crime, or upon charge of any crime before conviction, shall be allowed to have or drink any ardent or spiritous liquor, or any mixed liquor, part of which is spiritous, unless the physician, who is authorized to attend upon the sick in such prison, shall certify in writing that the health of such prisoner requires it ; in which case he shall be allowed the quantity prescribed by such physician and no more.

SECT. 9. *Be it further enacted*, That no person committed to gaol on execution or mesne process, who shall apply to the Overseers of the poor for relief, shall be permitted to have and use any spiritous liquors, without the consent of the* said Overseers. And if the keeper of any gaol, or other person shall give, sell or deliver to any such prisoner, or to any other person for his use, any spiritous liquors without the consent in writing of the said Overseers or one of them, first had and obtained, shall forfeit and pay for each offence a sum not less than five, nor more than ten dollars, to be recovered by complaint to any Justice of the Peace for the same county ; one moiety thereof to him who shall prosecute for the same, the other moiety to the use of the poor of the town where the gaol is situated. And it is hereby made the duty of the Sheriff, Gaoler and Overseers of the poor to prosecute for all offences which may come to their knowledge against the provisions of this section.

SECT. 10. *Be it further enacted*, That any gaoler or prison keeper, who shall wilfully, negligently or unnecessarily cause or suffer prisoners of different descriptions to be confined and kept together in the prison under his care, contrary to the provisions of the seventh section of this act, or shall voluntarily (a) or negligently suffer any prisoner in his custody, upon conviction or charge of any crime, to have or

(a) An agreement to indemnify an officer against a voluntary escape, is void, as against the policy of the law. *Ayer vs. Hutchins and al.* 4 Mass. 370.

drink any spiritous liquor, or mixed liquor, part whereof is spiritous, contrary to the provisions of the eighth section of this act, shall, in each case, forfeit the sum of twenty-five dollars for the first offence, to be recovered in an action of debt by any person who will sue for the same, to his own use, in any Circuit Court of Common Pleas, or by indictment in the same Court ; in which case the forfeiture shall be to the use of the county. And for a second offence, such gaoler or prison keeper, shall forfeit the sum of fifty dollars, to be recovered in manner and to the uses aforesaid ; and shall also be removed from his office, and be rendered and become incapable of holding the office of Sheriff, deputy Sheriff or gaoler, for the term of five years. And it shall be the duty of the Grand Jurors of the said Court, diligently to inquire of, and truly to present, all offences against the provisions of this act.

CH. 110.

Mode of recovery.

Grand Jurors to present violations.

SECT. 11. *Be it further enacted*, That every gaoler or prison keeper that shall voluntarily suffer any prisoner committed unto him to escape, shall suffer and undergo the like pains, punishment and penalties, as the prisoner, so escaping,* should by law, for the crime or crimes wherewith he stood charged, if he had been convicted thereof.†

[Mass. Stat. Feb. 21, 1785, § 4.]

[See ch. 430, § 6, vol. 3, p. 273.]

[†In case of capital crime, see ch. 430, § 6, vol. 3, p. 273.]

[*449]

Penalty for suffering a negligent escape.

[Ib. § 4.]

SECT. 12. *Be it further enacted*, That if any gaoler or prison keeper shall, through negligence, suffer any prisoner accused of any crime to escape, he shall pay such fine as the Justices of the Court, before whom he is convicted, shall in their discretion inflict, according to the nature of the offence for which the escaped prisoner stood committed : *Provided nevertheless*, That if any person who stands committed for debt, shall escape from prison, and the Sheriff, the gaoler or prison keeper shall, within three months next after such escape, recover the prisoner so escaped, and return him back to prison again, then the Sheriff shall be liable to nothing further than the cost of any action that may have been commenced against him for such escape ; and all fines arising upon the breach of this act, excepting the ninth and tenth sections thereof, shall be applied to the use of building and repairing the gaol or gaols in the county where the offence is

Proviso, if retaken on fresh pursuit.

Appropriation of fines.

CH. 110. committed, and shall be paid to the Treasurer of the county, for that purpose.

Punishment for conveying tools, &c. to a prisoner to aid his escape, &c.

[lb. § 3.]

Punishment in case of actual escape.

[*450]

Where escape happens through insufficiency of the gaol, Sheriff to be chargeable.

[lb. § 2.]

SECT. 13. *Be it further enacted*, That if any person shall directly or indirectly, without the knowledge or privity of the keeper, convey any instrument, tool or other thing whatsoever, to any prisoner, or into any prison, whereby any prisoner might break the prison, or work himself unlawfully out of the same, every person so offending shall forfeit and pay such fine as by the discretion of the Court shall be imposed, not exceeding three hundred dollars, according to the nature of the cause of the prisoner's commitment; or suffer such corporal punishment, not exceeding forty stripes, as the Court shall inflict; and if it shall so happen that any prisoner shall make his escape by means of any instrument, tool or other thing so conveyed, without the knowledge and privity of the keeper, the person so conveying the same shall be liable to pay all such sums of money as the prisoner stood committed for; and shall have inflicted upon him all such punishment as the escaped prisoner would be liable unto, if he had been convicted of the charge for which he stood committed, unless such prisoner would have been liable to capital punishment; in which case, the person assisting in such escape shall be punished by fine, imprisonment or sitting* on the gallows with a rope about his neck, or by solitary imprisonment for a term not exceeding three months, and confinement to hard labour for a term not exceeding five years; or any one or more of the said punishments, as the Court shall think proper to inflict.

SECT. 14. *Be it further enacted*, That where the escape of any prisoner shall happen through the insufficiency of the gaol (b), or the negligence of the Sheriff or gaoler, the Sheriff of the county, in which the escape happens, shall stand chargeable to the plaintiff, creditor or other person at whose suit or for whose debt he was committed, or to whose

(b) In an action of the case against a sheriff for the escape of a debtor committed on an original process, through the insufficiency of the gaol, the jury have a discretion in assessing the damages which the plaintiff has sustained, and are not bound to find for him his whole debt. *Burrill vs. Lithgow*, 2 Mass. 526.

use any forfeiture was adjudged against such prisoner ; and CH. 110.
 in case the escape shall happen through the insufficiency of
 the gaol, the Court of Sessions in the county shall have power
 and authority to assess the sum or sums upon the polls and
 estates of the county, and to order the county Treasurer
 to pay the same over to the Sheriff of the county ; and if the
 Court of Sessions shall not make such assessment, and if the
 Treasurer shall not pay such sum or sums within six months
 next after the demand shall be laid before the Court of Ses-
 sions, then the Sheriff of the county may bring his action
 against the inhabitants of such county, to be heard and tried,
 either in that or one of the next adjoining counties, at his
 election ; and an attested copy of the writ being left thirty
 days before the sitting of the Court, with the county Treasur-
 er, shall be held and adjudged to be sufficient notice of the
 suit ; and the Justices of the Court of Sessions shall have full
 power to appoint an agent or agents to appear and defend
 against such action ; and when it shall so happen that the suit
 shall be commenced in another county, and no Court of Ses-
 sions shall be holden within the county sued, between the
 time of the service of the writ, and the sitting of the Court
 before which the action is brought, the cause shall be con-
 tinued one term ; and all advantages shall be saved to the
 defendants, as though they had appeared at the first term ;
 and if judgment shall be given against the county, the debt
 may be levied by execution upon the goods, chattels or lands
 of any inhabitant or inhabitants of the county, who shall there-
 upon have his or their action jointly or severally in like man-
 ner against the county, to recover the monies so levied of
 him or them.

Court of Ses-
 sions to assess
 on the county
 the sum recov-
 ered of the
 Sheriff.

And in case
 they do not in
 6 months, the
 Sheriff may
 sue the county,
 for indemnity.

Mode of serv-
 ing writ.

Court of Ses-
 sions may ap-
 point an agent.

Action to be
 continued, in
 case, &c.

Debt may be
 collected of
 any inhabit-
 ants of the
 county.

SECT. 15.* *Be it further enacted*, That the keepers of
 the several gaols within this State, shall under the penalties
 as by law are provided for the custody and safe keeping the
 prisoners thereof, take custody of, and safely keep all prison-
 ers committed, under the authority of the United States, un-
 til they shall be discharged by due course of the laws there-
 of: *Provided*, That nothing contained in this act shall be so
 construed, as to authorize the keepers of the said gaols to
 take custody of, and keep within said gaols any prisoners

[*451]

Keepers of
 gaols to re-
 ceive and de-
 tain United
 States Prison-
 ers committed
 by judicial au-
 thority.

[Mass. Stat.
 Feb. 26, 1790,
 § 1.]

CH. 111. committed by any other authority than the Judicial authority of the United States.

County Treasurers to receive the monies paid for keeping such prisoners.

[Ib. § 2.]

SECT. 16. *Be it further enacted*, That the several Treasurers of the respective counties within this State, and their successors, be and they are hereby authorized and directed, to receive for the use of their respective counties, to defray the county charges arising therein, all such monies as the United States have agreed to pay for the use and keeping of such gaols, and to account for the same according to law. [Approved March 19, 1821.]

Additional Act, ch. 277, Vol. 3, p. 104.

Chapter 111.

AN ACT respecting Houses of Correction, and for suppressing and punishing of Rogues, Vagabonds, common Beggars and other idle or disorderly persons.

Each county to be provided with a house of correction.

[Mass. Stat. Mar. 26, 1788, § 1.]

Common prisons to be used as such, until houses of correction are provided.

SECT. 1. *BE it enacted by the Senate and House of Representatives, in Legislature assembled*, That there shall (a) be erected, built or otherwise provided by the Court of Sessions, in every county (b) within this State, at the charge of such county, a fit and convenient house or houses of correction (where such house is not already provided) with convenient accommodations thereunto adjoining and belonging : to be used and employed for the keeping, correcting and setting to work of rogues, vagabonds, common beggars and other idle or disorderly persons. And until such house or houses of correction be erected, built or otherwise provided, the common prison in each county may be made use of for that purpose.

(a) This provision is peremptory on the Court of Sessions [County Commissioners—see ch. 500, vol. 3, p. 345;] to erect or provide a house of correction in each county, distinct from the common gaol, and a *mandamus* lies from the S. Court to compel them to do it. *Com. vs. Jus. Court of Sessions*, 2 Pick. 414.

(b) Every town is authorized to build a house of correction, by ch. 297, § 2, vol. 3, p. 136; see also, ch. 429, vol. 3, p. 271.

SECT. 2. *Be it further enacted*, That the Court of Sessions in each county may nominate and appoint, at their will and pleasure, a suitable person to be master of such house of correction; and also to make, ordain and establish such rules* and orders as may be necessary (not repugnant to the laws of this State) for the ruling, governing and punishing of such persons as may be there committed (c).

CH. 111.

Court of Sessions may appoint master of such house and establish regulations, &c.
[Ib. § 2.]
[*452]

SECT. 3. *Be it further enacted*, That the Courts of Sessions in their respective counties, where the circumstances may require it, be, and hereby are authorized and empowered, annually, to appoint three or five suitable and discreet freeholders of their county, living near the house of correction, to be overseers of such house; who shall have power to see that the rules appointed by the said Court, for the government of the house, and the persons therein confined, be duly observed; and also to examine the accounts of the keeper with respect to the earnings of the prisoners, and the expense of the institution; and they shall keep a register of all their proceedings fairly written. They shall have power to make contracts for work to be done in the house, with any person disposed to supply the materials, and to make contracts for letting out any of the persons confined, to employers living, in the estimation of the overseers, conveniently near to the house of correction for the overseers or the master of the house to have the general inspection of the persons so let out, and of the treatment they receive. And the overseers shall receive, out of the wages of the prisoners, such reasonable compensation as the Court of Sessions shall allow.

Court of Sessions in each county may appoint overseers of such house.

Power and duty of such overseers.

[Mass. Stat. Feb. 27, 1798, § 1.]

Their compensation.

SECT. 4. *Be it further enacted*, That the said Court of Sessions, shall at any time have authority to remove any of the overseers, and to replace others for the remainder of the year, and to fill up any vacancies of the overseers made by death, resignation or otherwise. They shall also, at every term, inquire into the state of the house of correction; and examine the register and accounts of the overseers and masters; and make such further regulations and alterations, in the

Court of Sessions may remove them;

[Ib. § 2.]

and examine the register and accounts of overseers.

(c) See note h, to § 12, of this chapter.

CH. 111. treatment and government of the prisoners, as they shall judge necessary or proper, and not repugnant to the laws of the State.

Rogues, vagabonds, &c. may be sent to the house of correction.

[Mass. Stat. Mar. 26, 1798, § 2.]

[*453]

[Powers of Justices of the Peace and C. P. enlarged. See additional act.]

Two Justices may send lunatics and dangerous persons to the house of correction.

[Mass. Stat. Feb. 27, 1798, § 3.]

SECT. 5. *Be it further enacted*, That any Justice of the Peace (*d*), as well as the Circuit Court of Common Pleas, may send and commit unto the said house, to be kept and governed, according to the rules and orders thereof, all rogues, vagabonds and idle persons going about in any town or place in the county, begging; or persons using any subtle craft,* juggling or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found; common pipers, fiddlers, runaways, common drunkards, common night walkers, pilferers, wanton and lascivious persons, in speech, conduct or behaviour; common railers or brawlers, such as neglect their callings or employments, mispend what they earn, and do not provide for themselves for the support of their families; upon conviction of any of the offences or disorders aforesaid, complaint thereof having been made in writing.

SECT. 6. *Be it further enacted*, That when it shall be made to appear to any two Justices, *quorum unus*(*e*), that any person being within their county, is lunatic, and so furiously mad, as to render it dangerous to the peace or the safety of the good people, for such lunatic person to go at large; the said Justices shall have full power, by warrant under their hands and seals, to commit (*f*) such person to the house of correction, there to be detained till he or she be restored to his right mind, or otherwise delivered by due course of law. And every person so committed, shall be kept at his or her own expense, if he or she have estate; otherwise, at the

(*d*) See additional act, § 1.

(*e*) It is only necessary that *one* of the Justices should be of the *quorum*. *Gilbert vs. Sweetsir*, 4 *Glf.* 483.

(*f*) Where one who had been committed to the house of correction as being a dangerous person to go at large, was brought from such house by order of court, and tried and acquitted on an indictment for murder, he was remanded by the court to the place from whence he had been brought. *Com. vs. Merriam*, 7 *Mass.* 168.

charge of the person or town upon whom his maintenance was regularly to be charged, if he or she had not been committed ; and he or she shall, if able, be put to work during his or her confinement. CH. 111.

SECT. 7. *Be it further enacted*, That any person, standing convicted before the Supreme Judicial Court or Circuit Court of Common Pleas, for any crime punishable in part or in whole by imprisonment, may be sentenced by either of said Courts to suffer his imprisonment, either in the common gaol, or in the house of correction, at their discretion ; to be employed and kept to work therein, in the same manner, as persons committed to said house pursuant to the provisions of the fifth section of this act.

Courts may confine convicted persons in common gaol, or house of correction.

[Mass. Stat. June 23, 1802, § 3.]

SECT. 8. *Be it further enacted*, That either of said Courts may sentence any person standing convicted before them respectively, of an offence punishable in whole or in part by fine, to pay such fine with the costs of prosecution ; and in case he does not pay the same within ten days, that he be immediately thereafter conveyed to the house of correction, therein* to be safely held, employed and kept to work in the same manner as persons committed to said house pursuant to this act, for any term of time not exceeding six months. And the expense of keeping, supporting and employing such offender, after deducting the net amount of his earnings, shall be allowed by the Justices of the Court of Sessions, and paid to the keeper out of the county Treasury, in the same manner, and with the same right of reimbursement from the Treasury of the State, as the accounts of gaolers for the prison charges of persons confined in gaol, on charge of conviction of crimes and offences committed against the said State.

Courts may sentence convicts to house of correction conditionally, viz on non-payment of fine and costs. [Ib. § 4.]

[*454]

Expenses how to be paid.

SECT. 9. *Be it further enacted*, That the Courts of Sessions in their respective counties, shall provide and cause to be kept at the expense of their counties, suitable materials (g), sufficient at all times to employ and keep at work such as are or may be committed to the house of correction by force of any laws of this State ; and shall from time to time make and establish all necessary rules and regulations, touching the em-

Court of Sessions to provide materials for work, &c. [Ib. § 1.]

and establish rules thereto relating—

(g) See note h, 2, to § 12, of this chapter.

by the town to which such persons belong, if within this State, or at the charge of the State, if they belong to no particular town within it. And the master or keeper of every such house shall keep an exact account of all profits and earnings that shall arise from the labour of all such as shall be committed unto his care and custody, as well as the particular time of their commitment and liberation, and present the same account (upon oath if required) unto the Court of Sessions for the same county annually, and also whenever he shall by them be thereunto directed.

CH. 111.

His account to be allowed by Court of Sessions.

SECT. 12. *Be it further enacted*, That whenever there shall be due to any keeper of such house for the care, trouble and expense of keeping, supporting and employing any person committed as aforesaid, any sum or sums of money, and the same shall have been allowed, and duly certified by said Court (*h*), or their committee, he shall have a right to demand and recover the same of such person, his parent, master or kindred, who may be liable by law to maintain him, or of the town wherein he is lawfully settled; and if such person, parent, master, kindred or town shall refuse or neglect to pay such sum, for the space of fourteen days after the same shall have been demanded, in writing, of him or them respectively, or of one of the Selectmen of the town, the said* keeper shall have, and be entitled to an action of the case to recover such sum against the person so committed, or his parent or master, if any he have, liable by law to maintain him,

Mode of obtaining such compensation.

[Mass. Stat. June 23, 1802, § 2.]

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(*h*) 1. Where the accounts of the master of a house of correction had been allowed by the Court of Sessions, and one of the towns charged in them appeared by counsel and contested their allowance, the only notice to the town of the claim having been given at the court; it was *held*, in an action by the master against the town, to recover the compensation allowed by the Court of Sessions, that the want of notice to the town afforded no defence to the action; but that the record of the Court of Sessions was not conclusive as to the liability of the town, which could make in the action any defence to which it might be legally entitled. *Wade, adm. vs. Inhbts. of Salem*, 7 *Pick.* 333.

2. The neglect of the Court of Sessions to establish rules, &c. to provide materials, &c. [see same ch. § 9] and to keep accounts, &c. is no defence to an action by a master of the house of correction against a town, as provided by § 12. *Ib.*

1. The first part of the document is a list of names and addresses of the members of the committee.

2. The second part of the document is a list of names and addresses of the members of the committee.

3. The third part of the document is a list of names and addresses of the members of the committee.

4. The fourth part of the document is a list of names and addresses of the members of the committee.

5. The fifth part of the document is a list of names and addresses of the members of the committee.

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8. The eighth part of the document is a list of names and addresses of the members of the committee.

9. The ninth part of the document is a list of names and addresses of the members of the committee.



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— — — by original summons	384
— — — by capias or attachment	ib.
— — — by summons, when goods are attached	ib.
— — — execution	383
— — — habere facias possessionem	ib

VERBAL ERRORS IN THE ORIGINALS, CORRECTED.

Page 68, 11th line, *the* is inserted before "Court" &c.; Page 69, Sect. 15, 9th line, "to" is substituted for *of* before "hard" &c.; Page 76, Sect. 8, 1st line, *And* is omitted before "Be" &c.; Page 77, Sect. 10, 1st line, *And* is omitted before "Be" &c.; Page 78, Sect. 11, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 12, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 13, 1st line, *And* is omitted before "Be" &c.; Page 79, Sect. 2, 6th line, "by" is inserted before "confinement" &c.; Page 81, Sect. 1, 10th line, "a" is inserted before "legal" &c.; Page 82, Sect. 2, 14th line, "or" is substituted for *and*; Page 93, 35th line, "commissioner" is substituted for *commissioners*; Page 127, Sect. 3, 1st line, *And* is omitted before "Be" &c.; Page 129, Sect. 7, *And* is omitted before "Be" &c.; Page 147, Sect. 3, 11th line, "an" is inserted before "opportunity" &c.; Page 150, Sect. 9, 1st line, *And* is omitted before "Be" &c.; Page 160, 1st line, "a" is inserted before "right" &c.; Page 167, Sect. 11, 1st line, *And* is omitted before "Be" &c.; Page 200, 2d line, *of* is omitted before "suing" &c.; same Page, Sect. 16, 1st line, *And* is omitted before "Be" &c.; Page 226, 11th line, "of" is inserted before "this act" &c.; Page 234, 8th line, *the* is omitted after "being"; Page 245, Sect. 43, 3d line, the syllable "co" is prefixed to "executors"; Page 295, Sect. 11, 1st line, *And* is omitted before "Be" &c.; Page 323, Sect. 47, 10th line, "the" is inserted before "Sheriff" &c.; Page 375, Sect. 4, 2d line, "or" is inserted before "formedon" &c.; Page 378, 4th line, "and" is substituted for *or* before "merchant" &c.; Page 403, Sect. 2, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 3, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 4, 1st line, *And* is omitted before "Be" &c.; Page 404, Sect. 5, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 7, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 8, 1st line, *And* is omitted before "Be" &c.; Page 406, Sect. 2, 1st line, *And* is omitted before "Be" &c.; Page 407, Sect. 3, 1st line, *And* is omitted before "Be" &c.; Page 408, Sect. 5, 1st line, *And* is omitted before "Be" &c.; Page 417, Sect. 2, 2d line, "pleaded" is substituted for *plead*; Page 435, 18th line, *the* is omitted before "good" &c.; Page 442, Sect. 15, 2d line, "the" is inserted before "Peace" &c.; Page 445, Sect. 3, 1st line, *And* is omitted before "Be" &c.; Page 447, Sect. 2, 1st line, *And* is omitted before "Be" &c.; Page 449, Sect. 3, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 4, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 5, 1st line, *And* is omitted before "Be" &c.; Page 451, Sect. 2, 1st line, *And* is omitted before "Be" &c.; Page 452, Sect. 3, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 4, 1st line, *And* is omitted before "Be" &c.; Page 454, Sect. 5, 1st line, *And* is omitted before "Be" &c.; same Page, Sect. 6, 1st line, *And* is omitted before "Be" &c.; Page 463, 19th line, "when" is substituted for *where*; Page 481, 7th line, "as" is inserted before "his" &c.; Page 490, Sect. 2, 1st line, *And* is omitted before "Be" &c.; Page 491, Sect. 3, 1st line, *And* is omitted before "Be" &c.; Page 513, 3d line, *one* is omitted before "person" &c.; same Page, Sect. 3, 4th line, "agreeably" is substituted for *agreeable*; Page 527, Sect. 4, 5th line, "of" is inserted before "forfeiting" &c.; Page 530, Sect. 2, 1st line, *And* is omitted before "Be" &c.; Page 533, Sect. 2, 1st line, *And* is omitted before "Be" &c.; Page 544, Sect. 11, 8th line, "are" is inserted before "under" &c.

VERBAL ERRORS TO BE CORRECTED.

Page 119, 4th line, for "describe" read *described*; Page 132, Sect. 5, 4th line, insert *the* before "intent" &c.; Page 143, Sect. 4, 13th line, for "deed" read *deeds*; Page 145, Sect. 8, 4th line, for "is" read *are*; Page 169, 1st line, omit "the" before "law" &c.; Page 191, 10th line, for "creature" read *creatures*; Page 213, chap. 49, 7th line, for "of" read *to* after "printer" &c.; Page 236, 17th line, insert *other* before "estate" &c.; Page 243, Sect. 38, 5th line, insert *the* before "determination" &c.; Page 301, 7th line, omit the Brackets including "not"; Page 339, 1st line, for "any" read *an* before "officer" &c.; Page 354, Sect. 32, 2d line, for "a" read *any* before "writ" &c.; Page 364, 12th line, insert *them* before "judgment" &c.; Page 390, Sect. 10, 4th line, omit "any" before "one" &c.; Page 391, Sect. 11, 18th line, for "evidence" read *avoidance*; Page 392, 2d line, for "service" read *services*; Page 393, 17th line, for "agreeably" read *agreeable*; same Page, 24th line, for "agreeably" read *agreeable*; Page 401, Sect. 10, 6th line, for "this" read *his*; Page 424, 6th line, insert *and* before "the other" &c.; Page 435, 19th line, insert *to* before "bail" &c.; Page 440, Sect. 11, 8th line, for "plead" read *filed*; Page 442, Sect. 15, 9th line, for "costs" read *cost*; Page 454, 2d line, insert *then* before "have" &c.; same Page, Sect. 5, 10th line, insert *the* before "form" &c.; Page 459, Sect. 4, 11th line, insert *as* before "aforesaid" &c.; Page 464, 3d line, for "costs" read *cost*; Page 468, Sect. 7, 19th line, for "has" read *had*; Page 472, 26th line, for "discretion" read *direction*; Page 485, 1st line, for "and" read *or*; Page 511, Sect. 5, 20th line, for "Register" read *Registers*; Page 515, 1st line, for "this" read *the*; Page 530, chap. 108, omit "the" before "Records" &c. in the title; Page 533, chap. 110, insert *for* before "providing" &c. in the title.



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